

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 190~~9~~⁹

No. ~~1000~~ ~~1000~~ 5

THE PULLMAN COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS *EX REL.* C. C. COLEMAN,
ATTORNEY GENERAL OF SAID STATE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED JULY 9, 1907.

(20,784.)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 381.

THE PULLMAN COMPANY, PLAINTIFF IN ERROR.

VS.

THE STATE OF KANSAS *EX REL* C. C. COLEMAN,
ATTORNEY GENERAL OF SAID STATE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

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1 In the Supreme Court of the State of Kansas.

Be it remembered, that on the 1st day of November, A. D. 1905, there was filed in the office of the clerk of the supreme court of the state of Kansas, a petition in *Quo Warranto*, together with a waiver of the issuance and service of summons, and the entry by defendant of its appearance, which petition and waiver of summons is in words and figures as follows, to-wit:—

2 In the Supreme Court of the State of Kansas.

No. 14691.

Filed Nov 1, 1905. D. A. Valentine, Clerk Supreme Court.

THE STATE OF KANSAS, on the Relation of C. C. COLEMAN, Attorney General, Plaintiff,

vs.

THE PULLMAN COMPANY, a Corporation, Defendant.

Petition.

Comes now the State of Kansas by C. C. Coleman, the duly elected, qualified and acting Attorney General thereof, who prosecutes this action for and in behalf of the State of Kansas, and gives the court to understand and be informed:

1. That the defendant The Pullman Company, a corporation, is a corporation organized, incorporated and chartered under and by virtue of the laws of the State of Illinois, and that the said defendant has no other corporate rights, privileges or powers in the State of Kansas than those granted by the general laws of said state concerning foreign corporations together with such corporate powers, rights and franchises as said defendant may have under the laws of the United States as an agency of inter-state commerce, and for carrying on business between the states.

2. The plaintiff alleges that the said defendant is organized and chartered under the laws of the State of Illinois for the purpose of transacting the business of a sleeping, parlor and dining car company, which business is operated by furnishing sleeping cars, parlor cars, tourist cars and dining cars to railroads and railroad companies in operating their railroads and railways, the said Pullman Company reserving to itself the right to charge a certain price for the use of reserved seats in said cars by day and sleeping berths during the night time, seats only being furnished in parlor cars and meals only being served in dining cars; and in letting to railroad passengers who desire the same the additional accommodations furnished in the cars of the said Pullman Company of re-

3 served seats in the day time and sleeping berths by night;
and in receiving and collecting charges, fees and pecuniary
compensation for such services, rentals and accommoda-
tions; that the said business of the said company extends into every
part of the State of Kansas where any important railroad is operated;
and that the said business of the said company and the collection
of said fees is transacted by the said company through its agents
within the state.

3. The plaintiff further alleges that on or about the 18th day of
April, 1905, the said defendant presented to the charter board of
the State of Kansas its application to transact its business within
the State of Kansas as a foreign corporation; a true copy of which
application is hereto attached marked "Exhibit A" and made a
part of this petition; that such application set forth and was accom-
panied by a certified copy of the charter and articles of incorpora-
tion of said company; that it duly set forth the place where its
principal office and place of business was to be located, the full
nature and character of the business in which it proposed to engage,
the names and addresses of the officers, trustees, directors and
stockholders of the said corporation, a detailed statement of the
assets and liabilities of such corporation, and all other information
which the said charter board required for the purpose of determin-
ing the solvency of the said defendant; and that by the said appli-
cation and the documents accompanying the same, it appeared that
the authorized capital stock of the said defendant corporation is
Seventy Four Millions of Dollars (\$74,000,000.00) fully paid up
in cash. The plaintiff further alleges that with said application the
said defendant deposited with the Secretary of State an application
fee of Twenty Five Dollars (\$25.00), and also filed in the office
of the said secretary of State its written consent, irrevocable that
actions might be commenced against the said defendant in the
proper court of any county in this state in which the cause of action
arose and in which the plaintiff might reside by service of process
on the Secretary of State, and stipulating and agreeing that such
service should be taken and held in all courts to be as valid and
binding as if due service had been made upon the president or chief
officer of the said defendant, the same being duly executed by the
president and secretary of the said company and authenti-
cated by the seal of the said corporation and was accom-
panied by the duly certified copy of the order and resolution
of the board of directors of such corporation authorizing the presi-
dent and secretary thereof to execute the same.

4. Plaintiff alleges further that on the said 18th day of April,
1905, the said Charter Board of the State of Kansas, having under
consideration the said application of the defendant, made an order
with reference thereto by which the said application was granted
and the said applicant authorized and empowered to transact its
business within the State of Kansas, provided that said order should
not take effect and that no certificate of such authority should be
issued the said applicant until the said applicant should pay to

the State Treasurer of the State of Kansas for the benefit of the permanent school fund of the said State the sum of Fourteen Thousand and Eight Hundred Dollars (\$14,800) being the charter fee provided by law to be paid by a foreign corporation seeking to transact its business in this state with an authorized capital stock of Seventy Four Millions of Dollars (\$74,000,000.00), in such order specifically providing that it should be understood, ordered and provided that nothing contained in said order or in such requirement for the payment of charter fees should apply to or be construed as restricting in any wise the transaction by the said applicant of its interstate commerce, but that the same related only to the business of the said corporation to be transacted wholly within the State of Kansas. A true copy of which said order and action of the charter board is hereto attached, marked "Exhibit B" and made a part of this petition.

5. The plaintiff alleges further that the said defendant has wholly failed, neglected and refused to pay to the State Treasurer of the State of Kansas the said charter fee of Fourteen Thousand Eight Hundred Dollars (\$14,800.00) or any part thereof, and has wholly failed, neglected and refused to pay to the said State of Kansas by its Treasurer or otherwise any portion of the said fee and is in default of such payment and that therefore in pursuance of said order no authority has been granted to said applicant to transact within the State of Kansas its business as a Sleeping, Parlor and Dining Car Company, and no certificate of such authority has been issued to the said defendant, and the said defendant is without authority and without any certificate of authority to transact within the State of Kansas its business as a Sleeping, Parlor and Dining Car Company.

6. But the said plaintiff alleges that notwithstanding its said want of authority to transact within the State of Kansas its business as a Sleeping, Parlor and Dining Car company and notwithstanding its failure and refusal to comply with the order of the said charter board and its failure and refusal to pay to the Treasurer of the State of Kansas the amount of said charter fee, and notwithstanding it has received no authority or certificate of authority from the charter board to transact within the State of Kansas its business as a Sleeping, Parlor and Dining Car Company, and its want of authority to exercise within the State of Kansas its corporate powers as a foreign corporation, the said defendant has continuously since April 18, 1905, exercised and still continues to exercise within the State of Kansas corporate powers and franchises not conferred upon it by law, in that during such time it has continued its business as a corporation within the State of Kansas by causing its said Sleeping, Parlor, Tourist and Dining Cars to be transported over the roads and tracks of all the railroads in the State of Kansas, being drawn by the engines and trains of said railroads, but said cars remaining in the possession, control and under the operation of agents of the said defendant company, by letting, leasing and hiring to passengers on said railroads the accommodations of the said various kinds of

cars from points within the State of Kansas to other points within the State of Kansas; and by serving on its dining cars meals to railroad passengers within the State of Kansas, and by receiving and collecting money from the said railroad passengers for the said dining car, sleeping car and parlor car services, and that said business has, since said date, been carried on by the said defendant in every part of the State of Kansas and upon every railroad of importance within the State of Kansas between the various cities and stations of the said state lying upon the lines of the said railroads, and it has

6 been continuously during said period exercising its said corporate power as aforesaid, charging, receiving and collecting compensation for said services so rendered, regardless of the laws of the State of Kansas, without authority from the constituted authorities of the State of Kansas and without payment of the fees provided by law in such cases; and that the said defendant continuously, openly and avowedly continues to transact its said business as a sleeping, parlor, tourist and dining car company within the State of Kansas, and to receive and collect for such services rendered within the State of Kansas, in the aggregate, a very large sum of money without the payment of the charter fees required by law, and openly and avowedly refuses to pay the same and declares that it will not pay the same.

7. By reason of which said unlawful acts and the willful and unlawful failure and refusal of the said defendant company to comply with the requirements and laws of this state, the relator avers that the said defendant in each, every and all of its corporate acts hereinbefore set forth, and in the exercise of its corporate franchises as hereinbefore detailed, within the State of Kansas, has violated and disregarded the laws of this state, and that all the aforesaid business so performed by said defendant company, and all the fees and charges for the prosecution of such business collected by it as aforesaid for said services have been done, performed, collected and received in violation of and contrary to the laws of this state, and that the said defendant now continues from day to day to carry on and exercise the said corporate franchises within the said state in violation of the laws thereof and in total disregard of the provisions of the law applicable in such case, to the great and irreparable injury to the said State of Kansas and the people thereof.

8. And the said relator further shows to the court that the said plaintiff makes no complaint of any act of the said defendant whereby it performs any business constituting inter-state commerce or business transacted between the several states, nor on account of its receiving and transporting in its said cars passengers from the State of Kansas into other states or from other states into and through

7 the State of Kansas, but that the said complaint of the said relator refers only to and concerns only the business of the said defendant transacted wholly within the State of Kansas.

Wherefore, the said relator, in behalf of the State of Kansas, prays that the said defendant be required to show to the court by what warrant or authority it exercises within the State of Kansas

the corporate right and power of charging a price and compensation for the use of reserved seats in its cars by day, and sleeping berths during the night time and of serving meals in its dining cars within the State of Kansas, said services being rendered to and said fees being collected from passengers transferring upon railroads within the State of Kansas from places within the State of Kansas to other places within the State of Kansas; that it be adjudged by the court that the said defendant has no right or authority of law for the performance of such corporate acts as aforesaid and the exercise of such corporate powers and franchises and the carrying on of such corporate business in the State of Kansas; and that it be decreed and adjudged by the court that the said defendant be ousted of and from the exercise within the State of Kansas of the said corporate rights and franchises and of receiving compensation therefor, and that the defendant be adjudged to pay the costs of this proceeding.

C. C. COLEMAN,
Attorney General.

8

EXHIBIT "A."

*Application for Authority to Engage in Business in the State of
Kansas as a Foreign Corporation.*

To the Charter Board of the State of Kansas:

The Pullman Company, a corporation organized under the laws of the State of Illinois, applies for permission to engage in business in the State of Kansas, and for that purpose submits the following statement, to wit:

First.

A certified copy of its Charter or Articles of Incorporation, which is filed herewith.

Second.

The place where the principal office or place of business of said corporation is located is Chicago, Illinois.

Third.

The full nature and character of the business in which said corporation proposes to engage within the State of Kansas is—

The Pullman Company is largely engaged in the business of manufacturing, particularly of railroad cars of all kinds and classes, but among the railroad cars which it manufactures are sleeping cars, parlor cars, tourist or emigrant cars and some dining cars. Of the greater number of these latter classes of cars it retains ownership, and furnishes them to railroad and railway companies in operating their railroads and railways, and furnishing these cars to railroad and railway companies. The Pullman Company reserves the right to charge a certain price for the use of reserved seats therein by day and sleeping berths during the night time. Seats only are furnished in parlor cars and meals only are served in dining cars. Some of

these sleeping cars and emigrant cars and possibly some parlor cars are furnished to railroads which use them into, or into, through and out of the State of Kansas, and in such cases The Pullman Company lets to railroad passengers who may desire to avail themselves of the additional accommodations furnished in these cars reserved seats by day time and sleeping berths by night, and it is engaged and proposes to engage in this latter kind of business in the State of Kansas, but in no other business in that state.

Fourth.

The names and addresses of officers and trustees or directors are:
 Robert T. Lincoln, President.
 John S. Runnells, Vice-President.
 A. S. Weinsheimer, Secretary.
 George F. Brown, Treasurer.
 K. Demmler, Assistant Secretary.

Directors.

Marshall Field,	William K. Vanderbilt,
O. S. A. Sprague,	J. Pierpont Morgan,
Henry C. Hulbert,	Frederick W. Vanderbilt,
Robert T. Lincoln,	W. Seward Webb,
Norman B. Ream,	Frank O. Lowder.

Fifth.

Resources.	Dollars. Cts.	Liabilities.	Dollars. Cts.
Bills receivable, (see also receivable)		Capital paid up	74,000,000.00
Real estate (& plants)...	8,871,935.14	Surplus	18,017,374.87
* Personal property, (see note)	70,202,606.65	Undivided profits, (see surplus)	Nil
Stocks, bonds, and other securities	8,370,701.10	Bills payable	3,617,131.48
Merchandise, (see Personal property)		Accounts payable	Nil
Cash on hand	7,619,378.50	Bonded indebtedness	Nil
Due from banks, (see cash on hand)		Encumbrance on real estate or plant	Nil
Accounts receivable	7,727,474.70	Reserve accounts	7,157,589.74
Judgments	Nil		
Total	102,792,096.00	Total	102,792,096.00

* Including Cars and Equipments, foreign and domestic patents, Raw materials, Manufactured Products, & Franchises, book value.

Sixth.

The amount of the capital stock of said corporation is Seventy-Four Million Dollars, divided into Seven Hundred and Forty Thousand Shares, of One Hundred Dollars each.

We further state that the above application is made in good faith, with the intention that said corporation shall actually engage in the business specified, and none other.

9 STATE OF ILLINOIS, *Cook County, ss:*

I, Robert T. Lincoln, President, and I. A. S. Weinsheimer, Secretary, of the above-named corporation, do solemnly swear that the above is a full and complete statement of the resources and liabilities of said corporation as shown by the books of the same, and that said statement and the several matters and things contained in this application are true in every particular, to the best of my knowledge and belief. So help me God.

L. E. Mc.

ROBERT T. LINCOLN,
President.
A. S. WEINSHEIMER,
Secretary.

[CORPORATE SEAL.]

Subscribed and sworn to before me, this 5th day of May, A. D. 1905.

[SEAL.]

L. E. McPHERSON,
Notary Public.

[NOTARIAL SEAL.]

(My commission expires January 3, 1906.)

10

"EXHIBIT B."

The board having under consideration the application of The Pullman Company, a foreign corporation organized under the laws of the State of Illinois, for leave to transact the business of a sleeping car company in the State of Kansas; and it appearing that said foreign corporation has, in due form of law, filed with the Secretary of State a certified copy of its charter, executed by the proper officers of the state of its domicile, and the written consent, irrevocable, of said corporation that actions may be commenced against it in the proper court of any county in this state in which the cause of action may arise, accompanied by a duly certified copy of the resolution of the board of directors of said corporation authorizing the proper officers to execute the same, it is, upon motion, thereupon ordered that said application be granted and that said applicant be authorized and empowered to transact the business of operating sleeping cars, dining cars, tourist cars and other cars within the State of Kansas and receiving money for such services, and transacting within the State its business of a sleeping car and transportation company, provided, that this order shall not take effect and no certificate of such authority shall issue or be delivered to said company until such applicant shall have paid to the State Treasurer of Kansas for the benefit of the permanent school fund the sum of Fourteen Thousand Eight Hundred Dollars, being the charter fees provided by law, necessary to be paid by a corporation with a capital of \$74,000,000, seeking to transact business within this state.

It is further understood, ordered and provided that nothing herein contained shall apply to nor be construed as restricting in any wise the transaction, by said applicant, of its interstate business; but that

this grant of authority and requirement as to payment relate only to the business transacted wholly within the State of Kansas.

Filed Nov. 1, 1905.

D. A. VALENTINE,
Clerk Supreme Court.

11 Endorsed: 14,691. In the Supreme Court of the State of Kansas. *Of The State of Kansas ex rel. C. C. Coleman, Attorney General, Plaintiff, vs. The Pullman Company, a corporation, Defendant. Petition. Filed Nov. 1 1905 D. A. Valentine Clerk Supreme Court.*

12 In the Supreme Court of the State of Kansas.

THE STATE OF KANSAS on the Relation of C. C. COLEMAN, Attorney General, Plaintiff in Error,

vs.

THE PULLMAN COMPANY, a Corporation, Defendant in Error.

Entry of Appearance.

Comes now the defendant, The Pullman Company, a corporation and voluntarily enters its appearance in the above entitled cause and waives the issuance and service of a summons in said action, reserving to itself the right to plead to the petition filed in said action on or before December 25th, 1905.

ROSSINGTON & SMITH,
Attorneys for Defendant.

(Endorsed:) 14691. Waiver of Entry. Filed Dec. 6, 1905 D. A. Valentine, Clerk Supreme Court.

13 Be it further remembered, that afterwards on the 13th day of December, A. D. 1905, there was filed in the office of the clerk of the supreme court of the state of Kansas, a petition for the removal of this cause to the Circuit Court of the United States for the district of Kansas, and also on the same day a bond for removal, which petition and bond for removal together with the indorsements thereon, are in the words and figures as follows, to-wit:—

14 In the Supreme Court of the State of Kansas.

No. 14691.

THE STATE OF KANSAS on the Relation of C. C. COLEMAN, Attorney General, Plaintiff,

vs.

THE PULLMAN COMPANY, a Corporation, Defendant.

Petition of Said Defendant for Removal to the Circuit Court of the United States for the District of Kansas, First Division.

Your petitioner, The Pullman Company, respectfully shows to the Court that the matter and amount in dispute in the above-entitled

suit exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and that said suit is of a civil nature. That the petitioner, the defendant in the above-entitled cause, is a corporation chartered and organized under the laws of the State of Illinois, and having its principal office and place of business in the City of Chicago in said State, and was at the time of the commencement of this suit, and still is, a resident and citizen of said State of Illinois; that the said State of Kansas, plaintiff in the above-entitled cause, is one of the States of the United States; that the suit herein is of a civil nature at law, arising under the constitution and laws of the United States, to-wit, under article one, section eight, sub-division three, which provides: "The Congress shall have power . . . (3) to regulate commerce with foreign nations, and among the several states. . . ." Also, under article one, section eight, sub-division eighteen, which provides: "The Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all the other powers vested by this constitution in the government of the United States or in any department or officer thereof."

Also, under section one of the Fourteenth Amendment to the Constitution, which provides: "Nor shall any state deny to any person within its jurisdiction the equal protection of the laws."

15 Also, under the last clause of section one, article fourteen of the Constitution of the United States, as follows: "Nor shall any state deprive any person of life, liberty or property without due process of law."

Your petitioner, (as fully appears from the petition of the plaintiff in the above-entitled action and from your petitioner's application for authority to engage in business in the State of Kansas as a foreign corporation, dated the 5th day of May, 1905, which application is incorporated by reference in the petition of plaintiff in this action and made a part thereof,) was incorporated under the laws of the State of Illinois and is engaged in doing and carrying on a business in Kansas, and in that State and no other, which may be described as the furnishing of sleeping cars to railroad companies, as hereinafter mentioned; that this business is largely interstate in its character, as also appears from said statement made part of said petition. That although it is engaged in the manufacture of sleeping and other cars, it is not engaged in such business in the State of Kansas, but is only engaged in the business of letting railroad passengers who may desire to avail themselves of the additional accommodations furnished in sleeping cars to purchase reserved seats by daytime and sleeping berths by night, and that these cars are engaged in furnishing such accommodations over lines whereby the said sleeping cars are brought into, through, and out of the State of Kansas, and said passengers are accommodated with the use of the same over distances from within the State of Kansas out of the State of Kansas, and from outside of the State of Kansas into and through the State of Kansas, such business being commercial in its character and of the essential nature of commerce between the States.

That the said Pullman Company does not operate or in anywise

control the movement of such sleeping cars and is not a common carrier of passengers; that it enters into contracts with divers railroad companies operating railroads in all parts of the United States

and into and through the state of Kansas to lease and let, on terms mentioned in said contracts, sleeping cars for the use of the passengers carried over such lines of railroads, said passengers being under the charge and direction of the said railroad companies and their employes and the said sleeping cars forming parts of trains of said railroad companies operated and controlled as aforesaid. That under said contracts the said The Pullman Company is authorized to let the extraordinary sleeping car facilities to passengers as hereinbefore described upon such trains and to charge and receive a toll therefor; that such contracts have all been made outside of the State of Kansas.

The Pullman Company is not engaged in the dining car business in the State of Kansas.

That prior to the institution of said suit, as appears by said petition, a controversy arose between the Charter Board of the State of Kansas, and your petitioner, as follows: The said plaintiff contended that although said defendant was engaged in interstate commerce, your petitioner was none the less liable as a foreign corporation to pay the fee, tax, or exaction claimed upon its entire capital stock employed in all of its business, both in the manufacture of sleeping cars and the letting of accommodations therein to hire to the public, although, first, it was not engaged in the business of manufacturing such cars in the State of Kansas, and second, that in the letting of accommodations of sleeping cars to hire it was largely engaged in the business of interstate commerce. And this suit is to assert such claim and the further claim that for the non-payment of such tax upon the entirety of the capital stock the sleeping car business done wholly between points within the State of Kansas might be segregated and separated from the mass of business done by said Company and the Company excluded from doing the latter class of business, notwithstanding the interstate character of the remainder and notwithstanding the business of the Company was generally that of interstate commerce; that the said controversy arises under the constitution and laws of the United States.

That said petition asserts the right upon the refusal of your petitioner to pay the said sum of Fourteen Thousand, Eight Hundred Dollars (\$14,800.00) to oust and exclude your petitioner from the exercise within the State of Kansas of the alleged corporate rights and franchises of receiving compensation for sleeping car berths in all cases where such service begins and ends within the State of Kansas.

That the substance of the controversy appearing affirmatively in said petition between the plaintiff and the defendant, your petitioner, is whether under the constitution and laws of the United States the State of Kansas or its courts have power in respect to your petitioner, having in view your petitioner's federal rights averred and disclosed in said petition, to grant such relief as is demanded by the said petition.

And your petitioner says that this controversy is one inevitably arising under the constitution and laws of the United States for the following reasons:

First. A controversy is presented under article one, section eight, sub-divisions three and eighteen of the Constitution of the United States, because, if the State of Kansas has the power to exclude your petitioner as claimed by the plaintiff, even from the transaction of domestic business, it will tend to seriously impair its earnings as an incorporation engaged in and an instrument of interstate commerce, and by such impairment to seriously affect and impair the quality and character of service of an interstate character which your petitioner may render or be required to render to the public. All of which tends to regulate and would embarrass and obstruct interstate commerce.

Second. A controversy is presented under section one of the Fourteenth Amendment to the Constitution of the United States, as follows: Your petitioner having been lawfully and continuously engaged in the transaction of the business now sought to be enjoined, for a long period of time before the enactment of the law under which the plaintiff attempts to act, and your petitioner having the right to remain in Kansas even without the consent of the State of Kansas for the purposes of its interstate business at all events, and your petitioner being a person within the jurisdiction of the said State of Kansas and within the said first section of the

Fourteenth Amendment to the said Constitution and as such
18 being entitled to the equal protection of the laws of said State: by requiring your petitioner as a condition precedent to continuing any part of its business within the said State to pay an unreasonable tax of Fourteen Thousand, Eight Hundred Dollars, the same being measured by the capital employed by your petitioner in the entire United States and foreign countries in all of its business, when other persons and corporations are permitted to engage in such business within the said State without the payment of such tax, the said State of Kansas thereby denies to your petitioner the equal protection of the laws.

Third. A controversy is presented under the last clause of section one of Article Fourteen as follows: "Nor shall any state deprive any person of life, liberty or property without due process of law," in the respect that the said plaintiff claims that it has a right to impose a tax as a condition precedent to this defendant's doing that portion of its gross business which is domestic in its nature within the borders of the State of Kansas, such license fee or tax being upon the whole of the capital stock of said corporation employed in said business in all of the States of the United States, in Canada, and in Mexico, and in the business of manufacturing and selling cars, none of which latter business is transacted within the State of Kansas, and to exclude your petitioner from doing said domestic sleeping car business within said State, because it had not paid said license fee and claiming such payment to be a condition precedent to the doing of such business. Such license fee, therefore, so sought to be imposed would be a tax on the whole capital stock of the corpo-

ration, and, convertibly, a tax upon the property in which that capital is invested. That your petitioner pays all state, county and municipal taxes upon all of its property within the State of Kansas and has at all times done so, and your petitioner alleges that such additional imposition sought to be enforced in this case is a tax upon the property of said The Pullman Company permanently outside of the State of Kansas and is therefore the taking of property without due process of law and against the provisions of the constitution in that behalf, being the last clause of section one, 19 of article fourteen, as follows: "Nor shall any state deprive any person of life, liberty or property without due process of law."

Your petitioner offers herewith a good and sufficient surety for its entering into the Circuit Court of the United States for the District of Kansas, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by said Circuit Court, if said Court shall hold that this suit was wrongfully or improperly removed thereto. And it prays this honorable Court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond, and to cause the record herein to be removed into the said Circuit Court of the United States in and for the District of Kansas. And it will ever pray.

THE PULLMAN COMPANY,
By ROSSINGTON & SMITH,

Its Attorneys.

STATE OF ILLINOIS, *County of Cook, ss:*

John S. Runnells, being duly sworn, says: I am the Vice-President of the defendant, The Pullman Company; I have read the foregoing petition subscribed by The Pullman Company, and know the contents thereof, and that the same is true except as to those matters and things therein stated to be alleged on information and belief, and as to those things I believe them to be true.

JOHN S. RUNNELLS,

Subscribed and sworn to before me this 9th day of December, A. D., 1905.

[SEAL.]

L. E. McPHERSON,

Notary Public.

My Commission expires Jany. 3rd, 1906.

(Endorsed:) No. 14691. Supreme court, State of Kansas. The State of Kansas, *vs.* The Pullman Company. Petition for Removal. Filed Dec: 13, 1905, D. A. Valentine, Clerk Supreme Court. Rossington & Smith, Attorneys for Deft.

20

In the Supreme Court of the State of Kansas.

No. 14691.

THE STATE OF KANSAS on the Relation of C. C. COLEMAN, Attorney
General, Plaintiff,*vs.*

THE PULLMAN COMPANY, a Corporation, Defendant.

Know all men by these presents, that The Pullman Company, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, as principal, and The American Surety Company of New York, as surety, are held and firmly bound unto the State of Kansas on the relation of C. C. Coleman, Attorney-General, in the penal sum of Five Hundred Dollars, the payment whereof well and truly to be made unto the said State of Kansas on the relation of C. C. Coleman, Attorney-General, its successors and assigns, we bind ourselves, our successors, assigns and representatives, jointly and severally, firmly by these presents.

Yet upon these conditions: Said The Pullman Company having petitioned the Supreme Court of the State of Kansas for the removal of a certain cause therein pending, wherein the State of Kansas on the relation of C. C. Coleman, Attorney-General, is plaintiff and The Pullman Company is defendant, to the Circuit Court of the United States in and for the District of Kansas,

Now, If the said The Pullman Company, your petitioner, shall enter in the said Circuit Court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by the said Circuit Court of the United States, if the said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

21 In witness whereof, The Pullman Company has hereunto caused this bond to be signed by its President and its seal to be affixed by its Secretary this ninth day of December, A. D. 1905.

And The American Surety Company of New York has hereunto set its hand and seal the 12th day of December, A. D. 1905.

[SEAL.]

THE PULLMAN COMPANY,
By BOBT. T. LINCOLN, *President*,
AMERICAN SURETY COMPANY
OF N. Y.,
By P. I. BONEBRAKE,

Res. Vice-President.

Attest:

A. S. WEINSHEIMER, *Secretary*.

Attest:

H. E. VALENTINE,
Res. Assistant Secretary.

[SEAL.]

STATE OF ILLINOIS, *County of Cook*, ss:

On this 9th day of December, A. D. 1905, before me personally appeared Robert T. Lincoln, President of The Pullman Company, to me known, who, being duly sworn, did depose and say:

That he resides in the City of Chicago, County of Cook and State of Illinois; that he knows the corporate seal of The Pullman Company; that the seal affixed to the foregoing instrument is the corporate seal of said Company and was so affixed by order of its Board of Directors, and that by like order he signed the same as President. And on the same day and year before me personally appeared A. S. Weinsheimer, Secretary of said Company, to me known, who, being duly sworn, did depose and say that he resides in the City of Chicago, County of Cook and State of Illinois; that he knows the corporate seal of The Pullman Company; that the seal affixed to the foregoing instrument is the corporate seal of said Company

22 and was so affixed by order of its Board of Directors, and that by like order he attested the same as Secretary.

[SEAL.]

B. C. H. OLSON,
Notary Public.

My commission expires June 15 1909.

The foregoing bond approved this 6th day of January, 1906.

W. A. JOHNSTON,
Chief Justice.

(Indorsed:) 14691. Removal Bond. Filed Dec. 13 1905. D. A. Valentine Clerk Supreme Court.

23 Be it further remembered, that afterward on the 6th day of January 1906, the same being one of the regular judicial days of the January 1905 term of the supreme court of the state of Kansas, said court being in session at its court room in the city of Topeka, the following proceeding was had and remains of record to-wit:—

24 *Journal Entry Allowing Removal.*

In the Supreme Court of the State of Kansas.

14691.

THE STATE OF KANSAS *ex Rel.* ————, Plaintiff,

vs.

THE PULLMAN COMPANY, Defendant.

The defendant herein having within the time provided by law filed his petition for removal of this cause to the Circuit Court of the United States for the district of Kansas, and having at the same time offered his bond in the sum of Five Hundred (\$500.00) dollars, with the American Surety Company of New York, good and sufficient surety, pursuant to statute and conditioned according to

law, now, therefore this court does hereby accept and approve said bond and accept said petition, and does order that this cause be removed for trial to the next Circuit Court of the United States for the district of Kansas, pursuant to the statute of the United States, and that all other proceedings of this court be stayed herein.

25 And afterwards on the 29th day of June, A. D. 1906, there was filed in the supreme court of the state of Kansas, a certified copy of the order of the Circuit Court of the United States for the district of Kansas, remanding this cause back to the supreme court for hearing and argument, which order is in words and figures as follows, to-wit:—

26 In the Circuit Court of the United States, District of Kansas,
First Division.

No. 8382.

STATE OF KANSAS

v.

THE PULLMAN COMPANY.

Order.

Now on this 27th day of June, 1906, the motion to remand this cause to the state court from whence it came, having been heretofore submitted on printed briefs and arguments of counsel, and taken and held under advisement until this day, comes on for hearing and decision upon authority of the opinion of this court filed in cause No. 8372, *The State of Kansas, on relation of C. C. Coleman v. Western Union Telegraph Company*, it is ordered that said motion be, and the same is hereby sustained, and this cause is remanded to the state court for further hearing and determination.

JOHN C. POLLOCK, *Judge*.

Endorsed: 8382 Order remanding case. Filed June 28, 1906
Geo. F. Sharritt, clerk.

27 UNITED STATES OF AMERICA, *District of Kansas, ss:*

I, Geo. F. Sharritt, Clerk of the Circuit Court of the United States of America, for the District of Kansas, do hereby certify the foregoing to be a true, full and correct copy of an Order of said court from the record of the proceedings thereof in the suit of *The State of Kansas vs. The Pullman Company* Case No. 8382 in said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka in said District of Kansas, this 28th day of June A. D. 1906.

[SEAL.]

GEO. F. SHARRITT, *Clerk*.

(Endorsed:) 14691. *State ex rel. C. C. Coleman Atty Gen. v. Pullman Co* Copy order Filed Jun- 29 1906 D. A. Valentine
Clerk Supreme Court.

28 And afterwards on the 5th day of July, 1906 there was filed in the office of the clerk of the supreme court of the state of Kansas, a motion to reinstate this cause, which motion with the endorsements thereon is in words and figures as follows, to-wit:

29 In the Supreme Court of the State of Kansas.

No. 14691.

THE STATE OF KANSAS *ex Rel.* ————, Plaintiff,
vs.
THE PULLMAN COMPANY, Defendant.

Motion.

Comes now the said plaintiff and shows to the Court that the above entitled cause having been heretofore removed on petition of the defendant to the Circuit Court of the United States for the District of Kansas, upon consideration of said Court last named, and upon motion of the said plaintiff, has been by the order of said Court remanded;

Therefore said plaintiff moves the Court here that said cause be set down upon the dockets of this Court as originally commenced herein and with its original numbering and be assigned for hearing and argument in its regular order.

C. C. COLEMAN,
Attorney General.

The undersigned, attorneys for the above named defendant, acknowledge service of the foregoing motion and consent that said motion may be presented to and heard by the Court on Thursday, July 5th, 1906.

ROSSINGTON & SMITH,
Attorneys for Defendant.

(Endorsed:) 14691. State *ex rel.* ———— *v.* Pullman Co.
Motion to reinstate. Filed Jul- 3 1906 D. A. Valentine Clerk
Supreme Court.

30 Be it further remembered, that afterwards on the 5th day of July A. D. 1906, the same being one of the regular judicial days of the July 1906 term of the supreme court of the state of Kansas, said court being in session at its court room, in the city of Topeka, the following proceeding was had and remains of record in words and figures as follows, to-wit:

31 *Journal Entry of Reinstatement.*

In the Supreme Court of the State of Kansas.

14691.

THE STATE OF KANSAS *ex Rel.* — — —, Plaintiff,

vs.

THE PULLMAN COMPANY, Defendant.

Now comes John Dawson, assist't Att'y Gen. herein and presents his motion for a reinstatement of this cause upon the dockets of this court for hearing and argument; and thereupon, it appearing that this cause has been remanded by the United States Circuit Court to the State Supreme Court for hearing and argument, it is ordered that this cause be reinstated upon the dockets of this court for hearing and argument at the October 1906 session.

32 - And afterwards on the 28th day of November 1906 there was filed in the office of the clerk of the supreme court of the state of Kansas, the answer of the defendant, which answer with the indorsements thereon is in words and figures, as follows, to-wit:

33 In the Supreme Court of the State of Kansas.

No. 14691.

THE STATE OF KANSAS *ex Rel.* C. C. COLEMAN, Attorney-General,
Plaintiff,

vs.

THE PULLMAN COMPANY, a Corporation, Defendant.

Answer of the Pullman Company.

Rossington & Smith, Attorneys for Defendant.

John S. Rummells, F. B. Daniels, Of Counsel.

34 In the Supreme Court of the State of Kansas.

No. 14691.

THE STATE OF KANSAS *ex Rel.* C. C. COLEMAN, Attorney General,
Plaintiff,

vs.

THE PULLMAN COMPANY, a Corporation, Defendant.

Answer of the Pullman Company.

Comes now the defendant in the above-entitled cause, and for answer to the petition filed herein, says:

I.

It denies all and singular the allegations and averments in said petition contained, except as the same are hereinafter expressly admitted.

II.

Said defendant admits that it is a corporation organized and incorporated and chartered under and by virtue of the laws of the State of Illinois, and admits that it has all the corporate rights, privileges or powers in the State of Kansas granted by the general laws of the State concerning foreign corporations, and admits that it has in addition the corporate rights, powers and franchises under the Constitution and laws of the United States as an agency of interstate commerce and for carrying on business between the States.

III.

The said defendant admits that it is organized and chartered under the laws of the State of Illinois for the purpose of transacting the business of sleeping and parlor car company, which business is operated by furnishing, sleeping cars, parlor cars and tourist cars to railroad companies in operating their railroads and railways, said The Pullman Company reserving to itself the right to charge a certain price for the use of reserved seats in said car by day and for sleeping berths during the night time, and in letting to railroad passengers who desire the same the additional accommodations furnished in the cars of said The Pullman Company of the reserved
35 seats in the day time and sleeping cars by night, and in receiving and collecting charges, fees and pecuniary compensation for such services, rentals and accommodations. And it further admits that said business of said Company extends into every part of the State of Kansas where any trunk line railroad is operated, and that the said business of said Company and the collection of said fees is transacted by said Company, through its agents within the State.

IV.

Said defendant denies that it has or operates any dining cars whatsoever in or through the State of Kansas.

V.

Said defendant alleges that by far the greatest part of its business, indeed almost its entire business done in the State of Kansas, is of an interstate character, in that it undertakes to furnish continuous service and accommodation in sleeping cars in the form of seats by day and sleeping berths by night, together with all the facilities, comforts and conveniences of a sleeping car, to railroad passengers from the point of initiation of such service without the State of Kansas to and into the State of Kansas, and from points within the state of Kansas to points without the State of Kansas. In many if not most instances such service is continuous and unbroken, under the contract made with said passengers, into and through several States; that such service is analogous in such case, so far as its extent is concerned, to the service of the railroad company in the transportation of passengers upon their several tickets, such passengers riding upon said train upon interstate tickets furnished by the railroad company and contracting with defendant for a continuous in-

terstate sleeping car service; and said defendant avers that it was specifically chartered to engage in carrying on such interstate business.

VI.

Said defendant further avers that its business in furnishing sleeping car accommodations is coextensive with the United States and Canada, and that its lines of sleeping car accommodations are for the most part, if not entirely, coterminous with the great trunk lines of the United States over which its sleeping cars under contracts and agreements with the railroad companies are run, extending in some instances from the Atlantic to the Pacific, from the Great Lakes to the Gulf, and without exception so far as the lines passing through the State of Kansas are concerned, traversing more than one State.

VII.

That under its said charter the defendant Company is also authorized to engage in the business of manufacturing particularly of railroad cars of all kinds and classes, including ordinary passenger cars and all kinds of freight cars, and cars for use upon electric or trolley lines; that it carries on this business of manufacturing only in the State of Illinois, and has large manufacturing plants of great value located in the town of Pullman in the State of Illinois; that of its total capital stock a considerable part is employed in its manufacturing business transacted wholly within the State of Illinois; that it manufactures sleeping cars, parlor cars, tourist or emigrant cars, and some dining cars. Of the greater number of these latter classes of cars it retains ownership and furnishes them to railroad and railway companies in operating their railroads and railways, and in so furnishing these cars to railroad and railway companies The Pullman Company reserves the right to charge a certain price for the use of reserved seats therein by day and sleeping berths during the night time. A relatively small portion of these cars, both sleeping and emigrant cars and possibly some parlor cars, are furnished to the railroads which use them to or into, through and out of the State of Kansas, but of the total capital of The Pullman Company in use in its business aforementioned and described, relatively a very small part enters into or is employed in such last described service into and through the State of Kansas.

VIII.

And said defendant further admits that on the 5th day of April, 1905, it presented to the Charter Board of the State of Kansas its application to transact its business within the State as a foreign corporation, and that a true copy of such application is attached to the petition herein, marked "Exhibit A" and made a part of said petition. And it further admits that said charter was accompanied by a certified copy of the charter and articles of incorporation of the Company, and that it duly set forth the place where its principal office and place of business was to be located, the full nature and character of the business in which it proposed to

engage, the names and addresses of the officers, trustees, directors and stockholders of the corporation, and all other information which the said Charter Board required for the purpose, as defendant is informed and believes, of determining the solvency of said defendant; but said defendant avers that it did all this *ex gratia*, and not because it was or ought to be required to make such statement or that the filing of said application and statement was essential, prerequisite or necessary to its continued transaction of the business on which it had long been engaged in the State of Kansas. Said defendant further admits that with said application it deposited with the Secretary of State the application fee of twenty-five dollars, and also filed in the office of the Secretary of State its written consent, irrevocable, that actions might be brought against said defendant in any proper court in this State in which the cause of action arose and in which the plaintiff might reside, by service of process on the Secretary of State, stipulating and agreeing that said service should be taken and held in all courts to be as valid and binding as if due service had been made upon the chief officer of said defendant. And further admits that said written submission to service was duly executed by the president and secretary of said Company, and duly authenticated by the seal of said Company, and was accompanied by the duly certified copy of the order and resolution of the Board of Directors of said Company authorizing the president and secretary thereof to execute the same. But said defendant alleges that it made such written submission to service and paid such application fee voluntarily and *ex gratia* and out of a desire to avoid the appearance of not complying with the reasonable regulations of the State of Kansas made with reference to its own corporations; but denies that said payment and that said written submission were obligatory upon it or were necessary or essential as a condition precedent to its continuing to transact business within the State of Kansas, both state and interstate.

IX.

Said defendant admits that its authorized capital stock, as appears by the statement hereinbefore referred to, is seventy-four-million dollars (\$74,000,000), fully paid up in cash; but that said capital stock at the time said suit was instituted represented and covered all of the property and plant and business of The Pullman Company, both the manufacturing business wholly confined to the State of Illinois, and the other business of said The Pullman Company and the property used therein, carried on in all parts of the United States except the State of Kansas, as well as the property employed in the business, both state and interstate, transacted within the State of Kansas.

X.

Said defendant admits that the Charter Board of the State of Kansas made the order set forth and described in the said petition, but denies that said Charter Board had any power to withhold said certificate of authority to do business in the State of Kansas, as set forth in said order, or that the making of said order was the exercise of any

lawful authority or power imposed upon, vested in or granted to the said Charter Board by the laws of Kansas in that behalf, but on the contrary asserts that the action taken by the Charter Board, as above stated, was in violation of law, illegal, nugatory and void.

XI.

Said defendant admits that it has failed, neglected and refused to pay to the treasurer of the State of Kansas the said pretended charter fee of fourteen thousand eight hundred dollars (\$14,800.00) or any part thereof; and further admits that it has refused to pay to the State of Kansas, by its treasurer or otherwise, any portion of said fee, and admits that no certificate of authority has been issued to it; but denies that such certificate of authority is necessary to transact
39 its business and all of its business in the State of Kansas, or that by reason of the want of such certificate said defendant is without authority to transact within the State of Kansas its business as a sleeping car company and all the business that under its charter it may transact, both domestic and interstate.

XII.

Said defendant further admits that it has continuously since April 5, 1905, and still continues to exercise within the State of Kansas the right to do domestic business in the manner and form set forth, and described in said plaintiff's petition, but expressly denies that the exercise of such powers and franchises is derived from or dependent upon the laws of Kansas; and denies that it has exercised such powers regardless of the laws of the State of Kansas, or without authority from any lawfully constituted authority of the State of Kansas, or that it has done so without the payment of any fees in such case made and provided; but admits that it continues openly and avowedly to transact its said business as a sleeping car company within the State of Kansas, and to receive, charge and collect fees for such service from the citizens of the State of Kansas without the payment of the so-called charter fee sought to be imposed in this cause; and admits that it openly and avowedly refuses to pay the same; but denies that by its acts and doings, as hereinbefore admitted, it has, as charged in said plaintiff's petition, "violated and disregarded the laws of this State"; and further denies that all the aforesaid business was performed by said defendant, and all the fees and charges for the transaction of such business collected by it for said services had been done, performed, collected and received in violation of and contrary to the laws of the State of Kansas; and further denies that this defendant now continues from day to day to carry on and exercise its said corporate franchises within the State of Kansas in violation of the laws thereof and in total disregard of the provisions of the law applicable in such case, to the great and irreparable injury of the

40 State of Kansas and the people thereof, or any such matter or thing. But said defendant on the contrary alleges as follows:

That it, said The Pullman Company, was chartered by the State of Illinois to do a general sleeping car business throughout the

United States, such business so authorized being domestic to the extent that it was wholly transacted within the limits of any particular State, and interstate in the respect that it was transacted between the States; that under these charter rights and privileges and franchises it entered the State of Kansas shortly after the Pullman sleeping car was invented and furnished its cars to the first railroad traversing the State or any part thereof, to wit, the Missouri Pacific between St. Louis and Leavenworth, and afterwards to the Union Pacific, the Burlington, the Atchison, Topeka & Santa Fe, and the Rock Island roads, in the order of their construction, and as soon as sleeping cars were employed by them for the accommodation of their passengers; that as the business of said railroads has extended and grown, it has continuously and unremittingly built and furnished and ran said cars so far as the sleeping car element of such business was concerned; that by the use of said cars, sleeping car accommodations continuous in their character have been ever since furnished to citizens of the State of Kansas extending to all parts of the West and to the Pacific seaboard, and through tickets have been furnished for such accommodations with not to exceed one change by the way of Chicago, St. Louis and other great cities to the Atlantic seaboard and to the North.

And this defendant alleges further that by laws passed relating to private corporations, and especially by laws having reference to sleeping car companies, said defendant was induced and invited to engage in the sleeping car business into and through the State of Kansas, and to thereby furnish to the citizens of the State of Kansas sleeping car accommodations coextensive with railroad facilities upon all the trunk lines entering into or traversing the State of Kansas, and that upon the faith of such invitation and before the statute under which plaintiff claims the right to exact the charter fee in this suit was

41 enacted, contracts were made involving the expenditure of many thousands of dollars to furnish sleeping car accommodations into and through the State of Kansas upon the railroad lines thereof; that all of such money was expended in full faith and confidence in the laws already enacted in the State of Kansas for the furtherance and encouragement of such business, and also in the full faith that said Company would have the equal protection of the laws of the State of Kansas and the fair, equitable and equal treatment required by the Constitution of the State of Kansas in the matter of taxes and other public charges imposed upon it.

And said defendant denies that the State of Kansas has ever enacted any law that authorizes or justifies the institution of this proceeding; but on the contrary thereof, said defendant alleges that by the laws of the State of Kansas said The Pullman Company is now and has at all times been required to receive and accommodate all passengers asking for sleeping car service, and that it cannot if it would omit or withdraw from the due performance of such public duty.

And said defendant further alleges that there is no power or authority by law granted or anywhere to be found in the statutes of Kansas, either to the Charter Board or to the courts of said State, to

absolve said defendant from such public duty or to exclude or oust it from the due performance of the same.

XIII.

That there is no law of the State of Kansas which authorizes the Charter Board to segregate or set aside or apart any of the business done by any corporation, and particularly the defendant, whose business *quoad* the State of Kansas is almost wholly interstate, and forbid the doing of said business by said corporation, or make the exaction of an unlawful charter fee a condition precedent to the doing of such business. And said defendant alleges that the attempt upon the part of plaintiff through its said Charter Board to so set apart the domestic and intrastate business, and to exact such charter fee as a condition precedent to the doing of the same, and to differentiate such business from the interstate business, is not only wholly unauthorized by the laws of the State of Kansas, but tends to hinder,

embarrass and obstruct interstate business, in violation of section eight, article one, subdivision three of the Constitution of the United States, which provides: "The Congress shall have power * * * (3) to regulate commerce with foreign nations, and among the several States, * * *". Also, under article one, section eight, subdivision eighteen, which provides: "The Congress shall have power to make all laws which shall be necessary and proper for the carrying into execution the foregoing powers, and all the other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

The protection of which provisions of the Federal Constitution the defendant hereby expressly invokes.

XIV.

And said defendant alleges that it is a "person," within the "jurisdiction" of the State of Kansas, within the meaning of the first section of the Fourteenth Amendment of the Constitution of the United States, and as such is entitled to the equal protection of the laws of the State of Kansas. That by the laws of the State of Kansas, which the State of Kansas, through its attorney-general, seeks to enforce, any corporation, including sleeping car companies, organized in the State, are authorized to do business in the State of Kansas upon paying a charter fee based upon the actual capital of such corporation employed in the State of Kansas; whereas, in respect to the defendant Company, the Charter Board requires and is attempting to exact from the defendant Company by this proceeding a charter tax based upon the defendant's entire capitalization, to wit, seventy-four million dollars (\$74,000,000.00), which seventy-four million dollars represents the property of the defendant Company in the forty-five States of the American Union, in the Dominion of Canada, and in foreign countries; that such property thus represented by its capital has an actual *situs* and location in other states and countries, and has no *situs* and location in the State of Kansas, and includes valuable real estate in the State of Illinois and in the city of Chicago outside

of the State of Kansas, where is situated large and valuable properties appurtenant to the manufacturing element of the defendant's business.

That by the laws of the State of Kansas all sleeping, dining, palace and other cars that make regular trips over any railroad in this State and are not owned by such railroad company are required to be listed by the manager, agent or conductor, or other person having such cars in charge, and return made to the state auditor the same as is required of railroad companies, and the company operating or using such cars shall be held liable for the taxes due thereon.

That under the requirements of this statute the defendant has continually paid taxes to the State of Kansas upon all of its cars at a valuation levied by the State Board of Railroad Assessors; that the same cars pay taxes in other States through which they run, and that the aggregate of such tax upon its business is large and onerous; that the total valuation of such cars upon the last assessment is \$290,291. If, therefore, the tax sought to be exacted as a condition precedent to the doing of domestic business in this State rested only, as it does in the respect of a domestic corporation, that is within the taxing jurisdiction in this State, the imposition of the tax sought to be imposed by the State of Kansas, assuming the acts of the Charter Board to be legal and regular, would be many thousand per cent. less than the tax sought to be imposed by the State upon the defendant Company. And said defendant further alleges that to require this defendant as a condition precedent to continue one part of its business within the State to pay an unreasonable tax of \$14,800.00, the same being based upon and measured with reference to the capital employed by this defendant in the United States and foreign countries in all of its business, when other persons and corporations are permitted to engage in such business within said State without payment of such a tax, the said State of Kansas thereby denies to the defendant the equal protection of the laws. And this defendant hereby specially pleads this provision of the Constitution and invokes the protection of the same.

And said defendant, further answering, says that assuming that the Legislature of the State of Kansas had by its laws sought to impose a tax as a condition precedent to this defendant doing a domestic business within the borders of the State of Kansas, which this defendant denies (there being no legal or statutory warrant for such presumption), such license fee so imposed would be a tax on the whole capital stock of the corporation and, convertibly, a tax upon the property upon which that capital is invested. That said defendant pays all state, county and municipal taxes upon all of its property within the State of Kansas, and has at all times done

so, and said defendant alleges that such additional imposition sought to be enforced in this case is a tax upon the property of said The Pullman Company permanently outside of the State of Kansas, and is therefore the taking of property without due process of law and against the provisions of the Constitution in that behalf, being the last clause of section one, of article fourteen, as follows: "Nor shall any State deprive any person of life, liberty, or property without due process of law." And this defendant especially pleads this provision of the Constitution of the United States and invokes the protection thereof.

Wherefore, said defendant prays for judgment against said plaintiff, that it shall be hence dismissed with its costs in this behalf most wrongfully sustained.

ROSSINGTON & SMITH,

Attorneys for Defendant.

JOHN S. RUNNELLS,

F. B. DANIELS,

Of Counsel.

45 Be it further remembered, that on the 1st day of December 1906, there was filed in the office of the clerk of the supreme court of the state of Kansas, the demurrer of the plaintiff to the answer of the defendant, which demurrer is in words and figures, as follows, to-wit:

46 In the Supreme Court of the State of Kansas,

—.

THE STATE OF KANSAS on the Relation of C. C. COLEMAN, Attorney General, Plaintiff,

vs.

THE PULLMAN COMPANY, a Corporation, Defendant.

Demurrer.

Comes now the plaintiff and demurs to the answer of the said defendant filed herein, and alleges as ground for such demurrer that the said answer does not state facts sufficient to constitute any defense to the cause of action set forth in the plaintiff's petition.

Wherefore, the plaintiff demands judgment as prayed for in said petition.

C. C. COLEMAN,

Attorney General.

(Endorsed:) No. 14691 In the Supreme Court of the State of Kansas, The State of Kansas, *ex rel.* ———, Plaintiff, *vs.* The Pullman Company, a corporation, Defendant. Demurrer. Filed Dec. 1, 1906, D. A. Valentine, Clerk Supreme Court.

47 And afterwards on the 28th day of December A. D. 1906 there was filed in the office of the clerk of the supreme court of the state of Kansas an amendment to the answer of the defendant which amendment to the answer is in words and figures as follows, to-wit:

48 In the Supreme Court of the State of Kansas.

No. 14691.

STATE OF KANSAS *vs.* R. L. C. C. COLEMAN, Attorney General,
Plaintiff.

vs.

THE PULLMAN COMPANY, a Corporation, Defendant.

Amendment to Defendant's Answer.

And now comes said defendant, and by leave of Court amends its said answer by inserting after the words "trolley lines" in the seventh line of paragraph seven of said answer, the following:

That said The Pullman Company is one of the largest manufacturers of railroad freight cars in the United States, or perhaps in the world; that a very large portion of its business is devoted to such manufacture, and it fills contracts annually for many thousands of all kinds of cars for the transportation of freight, box cars, cattle cars, coal cars, flat cars and cars of all descriptions used in freight transportation.

And further amends its said answer by inserting the following at the end of paragraph twelve of said answer as the same is now on file:

That by Chapter eighty-four of the General Statutes of Kansas of 1905, the Board of Railroad Commissioners has been given the general supervision of all railroads operated by steam within the State and of all sleeping car companies. It is further declared by said act that it shall be unlawful for any railroad company or other common carrier to grant any special privileges to any person, firm or corporation either in the way of preference in furnishing cars, side track facilities, sites for elevators, mills, or warehouses, or any other form of preference, privilege or discrimination.

That the said railroad companies providing for sleeping car facilities upon their several lines have entered into contracts with said The Pullman Company whereby *they* are turned over by said defendant Company to the possession of the railroad companies a sufficient or agreed number of sleeping cars to supply the demand for such facilities upon such railroads; that under such agreement the railroad companies have an absolute right of disposition as to where said cars shall be operated and the same are to be used and are used in the formation of first class passenger trains; that The Pullman Company retains the ownership of said cars under the terms of said contracts and reserves as

compensation for their use the right of furnishing sleeping car facilities and accommodations to passengers upon said railroads holding first class passenger tickets who may present such tickets and demand such accommodations, furnishing conductors and porters for the special and limited service of providing such sleeping car facilities and accommodations.

That under the laws of the State of Kansas as above set forth such facilities must be furnished by the railroad companies if at all without any form of preference, privilege or discrimination to all first class passengers applying for the same and willing to pay the fees for the same, whether such passengers be intra-state passengers so-called, or interstate passengers.

That under the terms of said contracts and agreements of said The Pullman Company with the said railroad companies the said railroad companies are given the exclusive control and dominion of said sleeping cars while in use by them and the same are operated by the said railroad companies; the conductors and porters of defendant Company going upon said trains for the exclusive purpose of aiding in furnishing to the passengers of said railroad companies sleeping car facilities and privileges and attending to the comforts and convenience of the railroad companies' passengers upon the sleeping cars; that The Pullman Company in this respect is an agency of the railroad company, acting at all times under the supervision and control, and is bound to furnish such sleeping car facilities and privileges to all applying — the same without discrimination.

50 Said defendant, further answering said plaintiff's petition, says, that it has contracts with all the railroad companies operating through lines in the State of Kansas of the above described nature, whereby it undertakes to furnish sleeping cars and in addition proper attendance and service for the public traveling upon each of such railroads and demanding and paying for the sleeping car facilities and by the terms of said contracts with said railroad companies it undertakes and agrees to furnish to the public and all the public holding first class passenger tickets without discrimination of any sort or nature equal facilities upon such sleeping cars upon the payment of the usual and ordinary tariff charges for such service; and by said contracts said defendant Company is expressly forbidden to withhold such privilege from any properly conducted passenger, provided with the necessary transportation; that under and by the terms of their several contracts said The Pullman Company cannot renounce or withdraw from the furnishing of such facilities from those desiring to employ and use the same wholly within the State of Kansas; that the above several contracts between said railroad companies and The Pullman Company were all made long prior to the enactment of the law, the provisions of which form the basis of the present action and proceeding; that such contracts are legal, valid and proper, and in harmony and compliance with the laws of the State of Kansas then existing or since enacted with respect to the duties and obligations

of said The Pullman Company and the several railroad companies to the public.

And said defendant specially pleads that the relief sought in this action if granted and the defendant Company ousted and excluded from furnishing sleeping car facilities to the public and all the public, without discrimination and at all times, would be in violation of the constitution of the United States in that it would impair the obligation of said existing contracts between said The Pullman Company and said railroad companies; and said defendant especially invokes the protection of that provision of the Federal Constitution.

And said defendant, further answering, says that by reason of the existence of said contracts and the mutual obligations involved therein, and especially the obligation to maintain an equality of privilege between all passengers upon the railroad trains to which Pullman cars are attached, whether the same be domestic or interstate passengers, there appears to be, and said defendant avers there is, a defect of parties to this proceeding and that this Court cannot pronounce a judgment which shall abrogate, annul or impair any obligation of said contracts without the appearance of all the railroad companies operating said Pullman cars in the State of Kansas as parties thereto.

ROSSINGTON & SMITH,

Attorneys for Defendant.

The undersigned, Attorney-General of the State of Kansas, agrees that the foregoing amendment to the answer of the defendant, The Pullman Company, may be filed forthwith, to relate back to original filing, to be covered by Demurrer now on file—no continuance on writ of amendment.

Dated At Topeka, Kansas, December 28, 1906.

C. C. COLEMAN,

Attorney General.

(Endorsed:) No. 14691. Kansas Supreme Court. State of Kansas *ex rel. vs.* The Pullman Co. Amendment to Answer. Filed Dec. 28, 1906, D. A. Valentine, Clerk Supreme Court. Rossington & Smith, Topeka Kansas, Attorneys for Defendant.

Be it further remembered, that afterwards on the 2nd day of January 1907, the same being one of the regular judicial days of the January 1907 term of the supreme court of the state of Kansas, said court being in session at its court room in the city of Topeka, the following proceeding was had and remains of record, to-wit:

53 In the Supreme Court of the State of Kansas.

14691.

THE STATE OF KANSAS *ex Rel.*, Plaintiff,
vs.

THE PULLMAN COMPANY, Defendant.

Journal Entry of Submission.

This cause comes on to be heard on the pleadings filed herein; and thereupon said cause is submitted on brief of counsel for both parties and taken under advisement by the court. Plaintiff is allowed time within which to file reply brief.

54 And afterwards on the 11th day of May 1907, the same being one of the regular judicial days of the January 1907, term of the supreme court of the state of Kansas, said court being in session at its court room in the city of Topeka, the following proceeding was had and remains of record, to-wit:

55 In the Supreme Court of the State of Kansas.

No. 14691.

THE STATE OF KANSAS on the Relation of C. C. COLEMAN, Attorney
General, Plaintiff,

vs.

THE PULLMAN COMPANY, a Corporation, Defendant.

Journal Entry of Judgment.

And now, to-wit: on this 11 day of May, 1907, this cause comes on for decision upon the demurrer of the plaintiff to defendant's answer, and the Court being fully advised in the premises, sustains the demurrer of the plaintiff and the Court finds that the allegations in plaintiff's petition are true and that judgment should be given for the plaintiff, and against the defendant.

Wherefore, it is decreed, ordered and adjudged that the defendant, The Pullman Company, a corporation, be ousted, prohibited, restrained and enjoined from transacting any and all corporate business of a domestic character within the State of Kansas, and that it be ousted, prohibited, restrained and enjoined from transacting intrastate business in Kansas as a corporation. It is further ordered and decreed that this judgment shall in no wise affect the inter-state commerce of the business of this defendant, nor restrict it in the execution thereof, and it is further ordered and provided that this decree shall not affect any of the contracts, obligations, or corporate duties of this defendant corporation to or with the Government of the United States in any manner whatsoever.

It is further ordered and adjudged that the defendant pay the costs of this prosecution taxed at \$—, for which sum let execution issue.

56 And on the same day to-wit: the 11th day of May 1907, there was filed in the office of the clerk of the supreme court of the state of Kansas, the court's syllabus and opinion in said cause, which syllabus and opinion is in words and figures, as follows, to-wit:

57

No. 14691.

THE STATE OF KANSAS on the Relation of C. C. COLEMAN, Attorney General,

v.

THE PULLMAN COMPANY.

Original Proceeding in *Quo Warranto*.

Judgment of Ouster.

Syllabus by the Court, Burch, J.:

1. The Pullman Company, a corporation of the state of Illinois contracted with the railway companies operating lines of interstate railroads in Kansas to furnish them a sufficient number of Pullman cars to meet the demands of the traveling public for that kind of service, to equip such cars for use, to provide conductors and porters for them, and to supply Pullman accommodations to railway passengers holding proper tickets without discrimination between such passengers, reserving the right to charge and collect from passengers demanding the service compensation therefor. Subsequently the legislature enacted a law requiring foreign corporations to comply with certain conditions, including the payment of charter fees, for the privilege of transacting intra-state business, to which law the Pullman Company refuses to submit.

Held, that a judgment ousting it from the franchise of charging and collecting compensation for Pullman accommodations furnished to passengers taken up and set down within the limits of the state does not violate the obligation of its contracts with the railway companies.

2. Other questions of law decided in this case are covered by the syllabus and opinion in the case of *The State v. Western Union Telegraph Company*, No. 14636.

All the Justices concurring.

A true copy. Attest:

Clerk of Supreme Court.

THE STATE OF KANSAS on the Relation of C. C. COLEMAN, Attorney General,

v.

THE PULLMAN COMPANY.

Original Proceeding in *Quo Warranto*.

Judgment of Ouster.

The opinion of the court was delivered by BURCH, J.:

In this case the state on the relation of the Attorney General seeks to oust the defendant from the corporate franchise of charging and collecting from passengers on railroad trains compensation for the use of seats and berths in its cars between stations in Kansas. The cause is submitted upon a demurrer to the defendant's answer including an amendment thereto. The principal questions involved are identical with those just decided in the case of *The State v. The Western Union Telegraph Company*, No. 14636, the two cases being largely briefed together. So far as the matters determined are the same the opinion in the *Western Union* case may stand as the opinion in this one.

In a separate brief filed in this case the method of computing the amount of the charter fee to be paid by the defendant is made the subject of special animadversion because the defendant's capital of \$74,000,000 is largely employed in the manufacture of cars of various kinds in the state of Illinois and in carrying on the sleeping-car business in all the other states of the Union, in Canada and in Europe, the contention being that the law discriminates in favor of domestic corporations. The argument is even pressed to the point of questioning the good faith of the legislature—as if the court could deal with motive in the investigation of a question of power.

The size of the defendant's capital and the wide ramification of its operations has no effect upon the state's power to exclude
59 it from intra-state business. It is simply a foreign corporation. The power to exclude includes the power to impose any conditions however onerous short of exclusion the legislature may choose, and no one can gainsay its action.

There could have been no constitutional objection to its conduct if the state had preferred domestic corporations and had allowed them to exercise corporate franchises upon the payment of charter fees computed upon the amount of capital employed within the state, while foreign corporations were compelled to pay upon their whole capital wherever used. But the state did place foreign corporations upon identically the same basis as corporations of its own creation with respect to the payment of charter fees. Both kinds, foreign and domestic, pay the same fixed percentage upon the amount of their authorized capital stock, and the Supreme Court of the United States has many times declared that such a

method of fixing the charges for admission to the state is legal. The property of a Kansas mining company may all be located in Alaska or in South America, as the manufacturing plant of the defendant is located in Illinois, and its sleeping-car business is scattered throughout the world. The mining company must pay according to the amount of its capital stock.

The fact that other states may impose like conditions so that the defendant may be obliged to pay on forty-five times seventy-four million dollars to obtain permission to do local business in all the states is irrelevant. The state of Kansas is not obliged to yield its right to impose conditions upon the local exercise of foreign corporate franchises because other states have the same right. If so each state in the Union must make the same surrender, and the sovereign powers of a community of states may be circumvented or defied by a creature of one of them which has grown large enough to spread its business over all.

So long as a state confines its regulations of a corporation engaged in interstate commerce to domestic commerce only it does not encounter the constitutional power of congress over interstate commerce; and if each state is equally circumspect the conduct of the defendant's domestic business in all the states may be
60 conditioned as provided in the Bush Act without affecting interstate commerce in any degree.

The state of Kansas might have adopted a different rule for computing charter fees. It might have made the amount of capital employed in the state or the amount of property located in the state the basis. The defendant might have been satisfied with one of these bases if the rate had been low enough. But the choice of bases and rates lay with the legislature and its judgment binds. It was levying no tax. It was fixing a condition precedent, and principles governing the framing of ordinary revenue laws have no application.

The state went further in its adoption of the principles of equality and uniformity.

By section 1339, Dassel's Statutes 1905, quoted in the opinion in *The State v. The Western Union Tel. Co.*, foreign corporations admitted to do business within the state are made subject to the same provisions, judicial control, restrictions and penalties as domestic corporations—excepting only the necessary minor differences covered by the Bush Act itself. Provisions of this kind are construed to exempt foreign corporations paying license fees and receiving permission to engage in business within the state from any greater duties, burdens, liabilities or restrictions than those thereafter imposed upon domestic corporations. (*American S. & R. Co. v. Colorado*, 27 Sup. Ct. Reporter, 198.) So that, having the power at the outset to prefer its own corporations by its laws, the legislature renounced that power in favor of foreign corporations which comply with the Bush Act.

By the payment of its charter fee of \$14,800 the defendant would, under the Bush Act and the order of the charter board, receive

authority to exercise its franchises within the state on the same terms and conditions as domestic corporations, for twenty years. Whether these terms are oppressive or not the defendant has no right to call upon this court to decide. To determine the question it would be necessary to make an investigation of what is for the best interest of the people of Kansas and that subject was
61 committed to the legislature and not to this court.

The amendment to the defendant's answer states that it has contracted with the railway companies operating interstate railroads in the state of Kansas to furnish them a sufficient number of Pullman cars to meet the demands of the traveling public for that kind of service. Ownership of the cars remains in the defendant. It furnishes facilities for the accommodation of travelers and furnishes conductors and porters, but the cars themselves are used in making up passenger trains, and are under the complete disposition and control of the railway companies, the defendant reserving the right to charge and collect from passengers holding proper railway tickets compensation for the accommodation furnished them. It is said that the railway companies as common carriers are bound by the laws of Kansas not to grant special privileges or preferences in relation to their service of the public. In supplying the needs and attending to the wants and comforts of the railway companies' passengers the defendant acts as the agent of such companies, agrees to furnish without discrimination equal facilities to all passengers who apply for them, and agrees not to withhold such privileges from any properly demeanored person provided with the requisite kind of transportation. The amendment also contains the following statement:

"That under and by the terms of their several contracts said Pullman Company cannot renounce or withdraw from the furnishing of such facilities from those desiring to employ and use the same wholly within the State of Kansas; that the above several contracts between said railroad companies and The Pullman Company were all made long prior to the enactment of the law, the provisions of which form the basis of the present action and proceeding; that such contracts are legal, valid and proper, and in harmony and compliance with the laws of the State of Kansas then existing or since enacted with respect to the duties and obligations of said The Pullman Company and the several railroad companies to the public.

"And said defendant specially pleads that the relief sought in this action, if granted and the defendant company ousted
62 and excluded from furnishing sleeping car facilities to the public and all the public, without discrimination and at all times, would be in violation of the Constitution of the United States, in that it would impair the obligation of said existing contract between said The Pullman Company and said railroad companies; and said defendant especially invokes the protection of that provision of the Federal Constitution."

The amendment to the answer is defective in that its statement of facts does not go far enough to show an exoneration of the de-

fendant from a public welfare law, even upon the theory of the law for which it contends.

The assertion that the defendant cannot under the terms of its contracts withdraw from furnishing the required facilities to passengers traveling from point to point within the state is not an allegation of fact, but the defendant's conclusion of law respecting the binding effect of its agreements. It states what the defendant conceives to be the legal principle governing its relation with the railroad companies, and not upon facts from which the deduction is made.

The pleading withholds from the court all information respecting the duration of the contracts. Unless they are for a definite period, and are not terminable at the defendant's will, the legal conclusion stated does not follow. If they are for ninety-nine years, or in perpetuity, the question would be presented if private corporations performing services to the public may secure everlasting immunity from police regulation by an agreement between themselves.

The defendant is undertaking to produce new matter which will destroy the case made by the petition. It proposes to show that an otherwise proper exercise of one of the state's most important powers should be stayed for a special and exceptional reason. Conceding that the police power of the state can be suspended by private agreement, any contract proffered as having that effect must be construed most strongly against the corporation and in favor
63 of the state; and when such a contract is spread upon a pleading nothing can be left to inference or taken by implication.

The court also deems the answer to be insufficient in that it proceeds upon an erroneous theory respecting the law.

The obligation of a contract is its engaging quality—the attribute of binding force upon the parties to it, and in this instance neither the Bush law nor a judgment of this court enforcing it can have any impairing effect upon the obligation of the contracts between the defendant and the railroad companies which it has engaged to serve.

Every right and every remedy each party had against the other when the contracts were made remains in full force and effect. Not a term or a condition is changed or dispensed with or its efficiency weakened. The railroad companies may still call upon the defendant to furnish cars and equipment and attendants for its Pullman passengers or to respond in damages. The defendant may demand that its cars be hauled by the railroad companies, and may vindicate as against such companies every right secured to it by its contracts, including the right to demand and receive from the occupants of its cars compensation for services rendered.

The value of the contracts to the defendant may be greatly diminished, but the obligation of the parties to each other is not affected in the slightest degree.

"Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be

affected in many ways by State and National legislation. For such legislation demanded by the public good however it may retroact on contracts previously made, and enhance the cost and difficulty of performance, or diminish the value of such performance to the other party, there is no restraint in the Federal Constitution, so long as the obligation of performance remains in full force." (*Curtis v. Whitney*, 13 Wall. 68, 70.)

64 This court had occasion to interpret the Bush Act with reference to its effect upon contracts in the case of *State v. Book Co.* 69 Kan. 1. It was held that the purpose of the law was the regulation of foreign corporations by the state, and that contracts are not invalidated or the binding force of obligations impaired even although created by a foreign corporation after the Bush Act took effect and before compliance with its requirements. It was said that the enforcement of the law is a matter for the state alone. Contracts made by an unlicensed corporation are not unlawful and neither party to a contract with such a corporation on one side can secure release by pleading failure to obey the statute. Much less can it be said that the law weakens the obligatory quality of contracts made prior to 1898.

The case of *Bedford v. Eastern Building and Loan Ass'n*, 181 U. S. 227, cited by the defendant, is in harmony with this view. A mortgagor attempted to resist the enforcement of his obligation because the mortgagee had not complied with conditions imposed, after the contract had been made, upon its right to do business in the state. The right of the state to impose the conditions was recognized, and the right of the corporation to retire from business in the state because the conditions were too onerous to be met was recognized, but the statute did not discharge the obligation of the mortgagor to pay his debt. The decision is a precedent for nothing more.

There is a closer analogy between the present case and that of *Kehrer v. Stewart*, 197 U. S. 60, 70. There an agent of a foreign corporation was employed at a salary of \$25 per week. A law of the state where the service was to be performed imposed upon him a license tax of \$200 for conducting the business of his principal. He claimed it violated the obligation of his contract but the court said his contract remained entirely undisturbed.

In the case of *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, a statute was passed subsequent to the formation of an insurance corporation and its compliance with the law, imposing new conditions upon the transaction of its business and providing that if its financial affairs should be discovered to be in a certain state it should be wound up and dissolved. It was held the law did not violate the obligation of the company's contract with either its creditors or its policy holders.

The opinion reads:

"The contracts of policy-holders and creditors are not annihilated by such a judgment as was rendered below; for, to the extent that the company has any property or assets, their interests can be protected, and are protected by that judgment. The action of the state

may or may not have affected the intrinsic value of the company's policies; that would depend somewhat on the manner in which its affairs have been conducted, upon the amount of profits it has realized from business, and upon its actual condition when this suit was instituted."

No element of the defendant's contracts with railroad companies being changed or abrogated and no remedy for enforcing the rights of the parties having been obstructed, enfeebled or withdrawn, the defendant is simply in the situation of having made contracts to supply, equip and conduct its cars without guarding against the contingency that a charter fee might be exacted of it for the privilege of fulfilling them so far as business domestic of the State of Kansas is concerned.

The laws of Kansas impose no duty upon the defendant to continue to furnish Pullman accommodations to passengers from point to point with the state. It is entirely free to renounce such business if it so desire, rather than comply with the Bush Act. If it has deprived itself of that privilege by contract with the railroad companies transporting its cars the result cannot be attributed to any wrongful action on the part of the state. If the defendant must now either pay its charter fee or respond in damages to the railroad companies its predicament is the result of its own voluntary conduct.

66 As shown by the authorities cited in the Western Union case the forbearance of the state to impose restrictions upon the conduct of the defendant's business within the state at an earlier date did not atrophy its power. The state was not obliged to anticipate that the defendant might make contracts in domination of its authority, and hasten action to prevent the corporation from emancipating itself. It was required to consult nothing but the best interests of its people, and whenever occasion arose it could draw upon its constitutionally reserved fund of power to the extent necessary to promote their welfare.

The defendant itself was charged with full knowledge of the law and of the fact that the tenure of its franchises was at the sufferance of the state, and no individual or corporation could by making a contract with the defendant secure for it a supremacy over the laws which it could not by itself attain. Every person contracting with the defendant did so charged with the knowledge that the state could and might rightfully change its policy of comity at any time. If it did so the defendant's ability to perform might be impaired or destroyed and its obligation to perform might have to be satisfied with damages. The state having violated no contract with the defendant or the parties to which the defendant has engaged itself, and having preserved in full force the obligation of the contracting parties to each other, neither of them can complain of the enactment of the Bush law. (See *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 619.)

The defendant's case is not improved by pleading that it has undertaken to serve the railway companies' passengers according to the anti-discrimination law of Kansas. The obligation to do this

is no different from the obligation to perform any other act according to a righteous standard. It will not be impaired when the obligation of other contracts would not be impaired. It will be as binding upon the defendant after a judgment of ouster as before.

It may be observed that the law pleaded was enacted at the legislative session of 1905, six years after the Bush Act was passed and many more years after the defendant claims it made its contract with the railway companies; and it may be surmised that if the state were to make an effort to apply the law to the interstate business of the defendant the claim would be made quite promptly that such business was under the exclusive control of Congress. The answer, however, being insufficient for the reasons already stated, these anomalies may be overlooked.

The question whether the defendant is a common carrier is of no importance. The declaration that it is such in the act of Congress of June 29, 1906, ch. 3591, U. S. Stats. 1906, fixes its status only so far as it falls under federal control. If by the laws of this state it is a common carrier it is not bound to engage in intra-state business in opposition to the Bush Act. Further than this the matter need not be discussed. Neither the statute nor the relief sought in this action has any reference to the defendant's interstate business.

The demurrer to the answer as amended is sustained, except as to the part denying the operation of dining cars. By submission of the attorney general, dining car service is eliminated from the case. The defendant having submitted the cause upon its answer, judgment is rendered in favor of the state for the remainder of the relief prayed for and for costs.

All the Justices concurring.

A true copy.

Attest:

Clerk Supreme Court.

68 In the Supreme Court of the State of Kansas.

No. 14691.

THE STATE OF KANSAS *vs.* *Rel.* C. C. COLEMAN, Attorney-General,
Plaintiff.

vs.

THE PULLMAN COMPANY, a Corporation, Defendant.

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas, do hereby certify that the above and foregoing is a true, full, correct and complete transcript of the record in the above-entitled cause in said Supreme Court of Kansas.

Witness my hand and the seal of the Supreme Court of the State of Kansas hereto affixed at my office in the city of Topeka, this 29th day of June, A. D., 1907.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,

Clerk Supreme Court of the State of Kansas.

69 Here, follows the petition for the writ of error and the assignments of error, the order allowing the writ of error and fixing the supersedeas bond, the supersedeas bond, the writ of error and the allowance thereof, and the citation, together with the proof of service thereof.

70 In the Supreme Court of the United States.

THE PULLMAN COMPANY, a Corporation, Plaintiff in Error,

vs.

THE STATE OF KANSAS on the Relation of C. C. COLEMAN, Attorney-General, Defendant in Error.

The Pullman Company respectfully shows that on the 11th day of May, 1907, the Supreme Court of the State of Kansas rendered a judgment against your petitioner in a certain action wherein the State of Kansas on relation of C. C. Coleman, Attorney General, was plaintiff and The Pullman Company was the defendant; that in said judgment there was presented for adjudication by said Court, federal questions as to the force and meaning and effect of certain legislation of the State of Kansas affecting The Pullman Company which said The Pullman Company claimed to be violative of the provisions of the Constitution of the United States as set forth in and by the pleadings filed by The Pullman Company in the said cause and fully presented upon the record thereof, and which were decided by said Supreme Court of Kansas against the contention of said The Pullman Company. A full statement of said contention as made and the errors committed by the said Supreme Court of Kansas are contained in the assignment of errors filed herewith by your petitioner.

Your petitioner therefore presents herewith an exemplified transcript of the record of the said Supreme Court of Kansas in said cause and prays that a writ of error to said Supreme Court be allowed; that said citation be granted and signed; that the bond herewith presented be approved that the same may operate as a supersedeas; that the judgment of the said Supreme Court of Kansas be reviewed in the Supreme Court of the United States and the judgment of the said Supreme Court of Kansas be reversed and set aside.

71

Assignment of Errors.

I.

The Supreme Court of the State of Kansas erred in holding that chapter 10 of the Laws of 1898, as amended by chapter 125 of the Laws of 1901, constituted a regulation of foreign corporations engaged largely in the business of interstate commerce; and in further holding that it was not violative of section 8 of article 1 of the Constitution of the United States, and in denying the protection of said constitutional provision invoked by the defendant (plaintiff in error here) upon the trial.

II.

The Supreme Court of the State of Kansas erred in holding that the fact that the business of the defendant was largely interstate commerce constituted no defense to plaintiff's petition, and in further holding that the Charter Board under said Act might, without any specific statute regulating intra-state or domestic commerce, segregate the intra-state or domestic business from the whole business done by the corporation and impose upon it the license fee designed by statute and so definitely expressed to be exacted from the corporation as a whole to transact any business of any sort or character within the State.

III.

The Supreme Court of the State of Kansas erred in holding that the provisions of the Act of 1898 as amended by chapter 125 of the Laws of 1901, in so far as such Act required foreign corporations engaged largely in the business of interstate commerce to
72 pay the charter fee therein provided, does not constitute a regulation and restriction upon interstate commerce within the prohibition of the Constitution of the United States.

IV.

The plaintiff in error being an Illinois corporation, employing a portion of its capital stock in the State of Kansas and other portions of its capital stock elsewhere in interstate business wholly between other states, such interstate business conducted in the State of Kansas and the capital stock employed therein having no organic relation to or physical connections one with the other, the Supreme Court of the State of Kansas erred in holding that the provisions of the law described in the last assignment of error requiring payment of a charter fee as a condition precedent to doing business within that state, when applied to the defendant (plaintiff in error here) and to its entire capital stock, including that portion so employed in interstate business wholly without the State of Kansas and between states other than Kansas and without the organic relation or physical connection stated, was not a burden imposed by the State of Kansas upon interstate commerce and in further holding that such imposition did not constitute a regulation and restriction upon commerce between the states in contravention of the Constitution of the United States, the protection of which was especially invoked in that behalf by the defendant (plaintiff in error here.)

V.

The Supreme Court of the State of Kansas erred in its judgment in holding and deciding that the said Charter Board had power to withhold the certificate of authority of the defendant Company (plaintiff in error here) to do business in the State of Kansas, as set forth
73 in said order of said Board as the same appears in the petition of said State, and in holding that the making of said order was the exercise of any lawful authority or power im-

posed upon, vested in, or granted to said Charter Board by the State of Kansas in that behalf, and could or did exempt commerce between the states from the burden of the charter fee imposed, and in not holding as requested and prayed for by said defendant (plaintiff in error here) that the action taken by the Charter Board as above stated was without warrant of law, illegal, nugatory and void.

VI.

The Supreme Court of the State of Kansas erred by its judgment in holding that the State could impose a charter fee as a condition precedent to the granting of permission to a foreign corporation to do business within the State which was largely and almost entirely engaged in the business of interstate commerce; and in holding further that in dealing with such foreign corporation it could deal with it differently from other corporations in the respect that without any action upon the part of the State Legislature warranting or authorizing it so to do it could exclude such corporation from doing intra-state or domestic business.

VII.

The Supreme Court of Kansas erred in its judgment in holding that it could supply the want of legislative act or direction by mere judicial interpretation, and in holding that the act in this respect was subject to interpretation or could be dealt with or held or construed in any manner otherwise than according to its plain import.

74

VIII.

The Supreme Court of the State of Kansas erred in holding that for refusing to pay a license tax imposed as a condition precedent for all corporations to do business, the Charter Board of Kansas, without legislative warrant, could impose the entirety of such tax upon the right or privilege to do intra-state or domestic business, and in holding that the Court by interpretation could justify such exaction.

IX.

The Supreme Court of Kansas erred in deciding that for failure to comply with the provisions of chapter 10 of the laws of 1898 as amended by chapter 125 of the Laws of 1901, a corporation engaged in interstate commerce might be ousted from the privilege of engaging in intra-state business.

X.

The Supreme Court of the State of Kansas erred in deciding that the foregoing statute was not obnoxious to the provisions of the Constitution of the United States granting to Congress the exclusive power to regulate commerce between the states and with foreign nations.

XI.

The Supreme Court of the State of Kansas erred in holding that it was the intention of the legislature that the law should apply to

foreign corporations that were doing business in the State at the time it took effect; and in further holding that such license tax might be imposed upon The Pullman Company notwithstanding the allegations of the twelfth paragraph of its answer, which were admitted by demurrer, and that those allegations hereunto appended constituted no defense to this proceeding, gave said The Pullman

75 Company no vested rights, relieved it from no obligations as a corporation to pay, but subjected it upon the failure to pay the fee imposed upon it not as a regulation of intra-state or domestic commerce, but as a condition precedent to its doing business as a corporation, to be ousted from the privilege of doing part of its business in the State of Kansas.

We herewith, for convenience, quote that portion of paragraph twelve of defendant's answer and make it a part of this assignment of error, as follows:

"That it, said The Pullman Company, was chartered by the State of Illinois, to do a general sleeping car business throughout the United States, such business so authorized being domestic to the extent that it was wholly transacted within the limits of any particular state, and interstate in the respect that it was transacted between the states; that under these charter rights and privileges and franchises it entered the State of Kansas shortly after the Pullman sleeping car was invented and furnished its cars to the first railroad traversing the State or any part thereof, to-wit, the Missouri Pacific between St. Louis and Leavenworth, and afterwards to the Union Pacific, the Burlington, the Atchison, Topeka & Santa Fe, and the Rock Island roads, in the order of their construction, and as soon as sleeping cars were employed by them for the accommodation of their passengers; that as the business of said railroads has extended and grown, it has continuously and unremittingly built and furnished and ran said cars so far as the sleeping car element of such business was concerned; that by the use of said cars, sleeping car accommodations continuous in their character have been ever since furnished to citizens of the state of Kansas extending to all parts of the West and to the Pacific seaboard, and through tickets have been furnished for such accommodations with not to exceed one change by the way of Chicago, St. Louis and other great cities to the Atlantic seaboard and to the North.

And this defendant alleges further that by laws passed relating to private corporations, and especially by laws having reference to sleeping car companies, said defendant was induced and invited to engage in the sleeping car business into and through the state of Kansas, and to thereby furnish to the citizens of the state of Kansas sleeping car accommodations coextensive with railroad facilities upon all the trunk lines entering into or traversing the state of Kansas, and that upon the faith of such invitation and before the statute under which plaintiff claims the right to exact the charter fee in this suit was enacted, contracts were made involving an expenditure of many thousands of dollars to furnish sleeping car accommodations into and through the State of Kansas upon the railroad lines thereof; that all of such money was expended in full faith and confidence in

the laws already enacted in the State of Kansas for the furtherance and encouragement of such business, and also in the full faith that said Company would have the equal protection of the laws of the State of Kansas and the fair and equitable and equal treatment required by the Constitution of the State of Kansas in the matter of taxes and other public charges imposed upon it."

76

XII.

The Supreme Court of the State of Kansas erred in failing to hold that if the so-called Bush Act was applicable to it at all, it could only be applied to it as a corporation generally, and not as a corporation, incidentally and necessarily engaged in doing intra-state or domestic business.

XIII.

The Supreme Court of the State of Kansas erred in holding albeit it was by the Court admitted (as appears in syllabus No. 13, prepared and adopted by the Court under the law) that the "Bush Act requires that both foreign and domestic corporations shall pay before being authorized to do business, a charter fee computed at a fixed rate upon the amount of their authorized capital stock, irrespective of where such capital stock may be employed," that to enforce such an exaction against the plaintiff in error as a foreign corporation does not deprive such corporation of the equal protection of the laws, although the bulk of its capital may be invested in property outside of the State, which has no organic relation to or physical connection with the capital stock employed or business conducted by such corporation within the State of Kansas, as the same is alleged in the second paragraph of defendant's answer and the first amendment to defendant's *amendment to defendant's answer*, as follows:

"That said The Pullman Company is one of the largest manufacturers of railroad freight cars in the United States, or perhaps in the world; that a very large portion of its business is devoted to such manufacture, and it fills contracts annually for many thousands of all kinds of cars for the transportation of freight—box cars, cattle cars, coal cars, flat cars, and cars of all descriptions used in freight transportation, all of which business is transacted wholly within the State of Illinois."

77

XIV.

The Supreme Court of the State of Kansas erred in holding that the Bush Act, so-called, as interpreted by the State Court, was a proper exercise of the police power of the State and within the fair terms and limits of the exercise of such power with regard to a corporation like that of defendant (plaintiff in error here), and in further holding that said Act in providing for the collection of revenue from a foreign corporation in the form of a charter fee, such revenue not being specifically levied to defray an expense involved in the exercise of police power or any public expense incidental thereto, was a proper exercise of police power of the State. And in further holding that in the exercise of police power, the state could impose a burden upon the capital stock of the defendant (plaintiff

in error here) employed in inter-state commerce, as set forth in assignment of error IV, and also upon its capital stock employed exclusively in another state as set forth in assignment of error XIII.

XV.

The Supreme Court of the State of Kansas erred in holding that the imposition of the charter fee upon a foreign corporation, required by the provisions of the Bush Act, so called, as a condition precedent to doing business within the state, was not a tax, and in further holding that the state could tax the property of a foreign corporation employed and invested exclusively in another state and could tax other property of such corporation employed by it in interstate commerce in and between other states, none of which property has any organic relation to or physical connection with the property or capital stock employed by such corporation in the State of Kansas, under the guise of a charter fee as a condition precedent to doing a local or intra-state business in the State of Kansas.

78

XVI.

The Supreme Court of the State of Kansas erred in holding that a judgment ousting the defendant (plaintiff in error here) from local business for failure to comply with the Bush Act will not deprive The Pullman Company of property without due process of law.

XVII.

The Supreme Court of the State of Kansas erred in holding that the defendant (plaintiff in error here) was not denied the equal protection of the laws of the State of Kansas, in the respect that the Bush Corporation Act, so-called, applied, as interpreted by said Court in this case retrospectively to foreign corporations engaged in interstate commerce and admitted to the State and in the State prior to its passage in the manner and under the circumstances and conditions set forth in paragraph thirteen of defendant's answer, hereinbefore quoted, and did not apply to domestic corporations organized and existing and doing business in the State prior to the passage of the Act.

XVIII.

The Supreme Court of the State of Kansas erred in holding that as to such corporation, admitted to and doing business in the State prior to the passage of the Act as described in the last Assignment of Error, the imposition of a license tax predicated upon the whole of the capital wherever situated or invested and not confined to the capital invested and employed within the limits of the State, was not a taking of property without due process of law and did not amount to a denial of the equal protection of the laws in that behalf.

79

XIX.

The Supreme Court of the State of Kansas erred in holding that charter fee based on the amount of capital stock of a foreign corporation to be of the same legal character or effect as a specific sum

imposed as a license and condition precedent to doing business within the state, and in further holding that, as the amount of said charter fee was made by law to depend on the amount of capital stock, the state was not limited to the amount of capital stock brought into and employed in the state, and in not distinguishing between a specific license or charter fee as a condition precedent to doing business in the state by a foreign corporation and a fee which by its terms imposed a burden upon the whole capital stock of such foreign corporation and which in this case imposed such a burden upon property employed beyond the limits of the State of Kansas, and in holding that by the imposition of the latter burden upon the defendant (plaintiff in error here) it would not be deprived of its property without due process of law as prohibited by the constitution of the United States, the protection of which in that behalf was especially invoked by the plaintiff in error.

XX.

The Supreme Court of the State of Kansas erred in rendering a judgment of ouster in said cause against the defendant, plaintiff in error here.

XXI.

The Supreme Court of the State of Kansas erred in holding that "a judgment ousting The Pullman Company from the franchises of charging and collecting compensation for Pullman accommodations furnished to passengers taken up and set down within the
80 limits of the State does not violate the obligation of its contracts with the railway companies."

XXII.

The Supreme Court of the State of Kansas erred in holding that a state statute imposing upon a foreign corporation, as a condition precedent to doing business in the state, conditions more onerous than those existing when such corporation lawfully entered the state and made a lawful contract with another to do business therein, did not affect and impair the obligation of such contract as prohibited by the Constitution of the United States, the protection of which was especially invoked in that behalf by the defendant (plaintiff in error here) and in further holding in this case that the plaintiff in error might withdraw from and abandon certain business which it was bound under its contract to continue, and that it could retire from the execution of such a contract in any particular without the consent of the other party thereto.

XXIII.

The Supreme Court of the State of Kansas erred in holding that under the contracts between the defendant (plaintiff in error here) and the several railroad companies named in the answer, the plaintiff in error might not, until they expire, continue the performance of the conditions of the contracts lawfully enforceable against it without complying with terms imposed by the state subsequent to

the making of the contracts, as a condition precedent to the performance of a condition thereof within said state, which render such performance more onerous than when the contracts were made.

81

XXIV.

That the decision and judgment of the Supreme Court of Kansas deprives the defendant of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, the protection of which provision of the Constitution of the United States was specially invoked at the trial.

XXV.

That the decision and judgment of the Supreme Court of the State of Kansas deprived the defendant (plaintiff in error here) of the equal protection of the laws, in violation of the same amendment to the Constitution of the United States, the protection of which provision of the Constitution was specially invoked at the trial.

XXVI.

The decision and judgment of the Supreme Court of Kansas is violative of section 8, article 1 of the Constitution of the United States, the protection of which provision was specially invoked by the defendant upon the trial.

XXVII.

The Supreme Court of the State of Kansas erred in denying the defendant (plaintiff in error here) the protection of said provisions of the Constitution hereinbefore set out, and in addition thereto rendered a judgment in nowise warranted, supported or enjoined by the terms of the Bush Corporation Act, so-called, to-wit: Chapter 10 of the Session Laws of 1898 as amended by chapter 125 of the Laws of 1901, and the plain import of said Act in both text and title afforded no warrant for such construction and interpretation.

82

XXVIII.

That the legislature of Kansas never passed nor intended to pass, but on the contrary intended not to pass, any act regulating the intra-state commerce of foreign corporations imposing a license tax thereon, and the declaration and decision of the Supreme Court to that effect was wholly without warrant or support of any such legislative act; was judicial legislation, and in that respect not an exercise of the police power of the State and was absolutely nugatory and void.

XXIX.

The Supreme Court of the State of Kansas erred in holding that the legislature did not intend to regulate, restrict and burden interstate commerce in the enactment of the so-called Bush Corporation Act when the plain, manifest, necessary and logical result of the enforcement of the statute as interpreted by the Supreme Court of

the State of Kansas is and will be to so regulate, restrict and burden such commerce.

Wherefore, Your petitioner respectfully prays that a writ of error may be issued out of this Court, directed to the Supreme Court of the State of Kansas, commanding said Court to serve and send to this Court a full and complete transcript of the records of all proceedings of said Supreme Court of the State of Kansas in said case, wherein the State of Kansas, on the relation of C. C. Coleman, Attorney-General, is plaintiff, and The Pullman Company is defendant, and that your petitioner may have such other and further relief and remedy in the premises as to this Court may seem appropriate, and that said judgment of said Supreme Court of the State of Kansas in said case and every part thereof may be reversed by this honorable Court.

And your petitioner will ever pray.

THE PULLMAN COMPANY,
By ROSSINGTON & SMITH,

Its Attorneys.

JOHN T. RUNNELLS,
F. B. DANIELS,
Of Counsel.

[Endorsed:] Filed Jun- 29 1907 D. A. Valentine Clerk Supreme Court.

83 And thereupon, and on the said — day of June, A. D. 1907, before Honorable W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas, at his chambers in the city of Topeka, the following proceedings were had and remain of record at page — of Journal in words and figures following, to-wit:

No. 14691.

STATE OF KANSAS *ex Rel.* C. C. COLEMAN, Attorney-General,
Plaintiff,

vs.

THE PULLMAN COMPANY, a Corporation, Defendant.

Upon consideration of the Petition of The Pullman Company, the defendant in the above-entitled cause, the Court does allow the writ of error prayed for therein, upon The Pullman Company giving a bond according to law in the sum of Two Thousand Dollars.

W. A. JOHNSTON,

Chief Justice.

And on the same day, to-wit, the — day of June, 1907, said defendant filed its supersedeas bond as required by the foregoing order allowing the writ of error and said bond is in words and figures following, to-wit:

[Endorsed:] Filed Jun- 29 1907 D. A. Valentine Clerk Supreme Court.

84 In the Supreme Court of the State of Kansas.

No. 14691.

STATE OF KANSAS *ex Rel.* C. C. COLEMAN, Attorney-General,
Plaintiff,

vs.

THE PULLMAN COMPANY, a Corporation, Defendant.

Know all men by these presents, that we, The Pullman Company a corporation organized and existing under and by virtue of the laws of the State of Illinois, as principal, and The American Surety Company of New York, as surety, are held and firmly bound unto the State of Kansas in the sum of Two Thousand Dollars (\$2,000.00) to which payment well and truly to be made we bind ourselves, jointly and severally, and all and each of our heirs, successors, executors and administrators, firmly by these presents.

Sealed with our seal this 26th day of June, 1907.

Whereas, the above named The Pullman Company has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment of the Supreme Court of the State of Kansas rendered in the above-entitled action,

Now, therefore, the condition of this obligation is such that if the above named The Pullman Company shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise, to remain in full force and effect.

[Seal The Pullman Company.]

THE PULLMAN COMPANY,
By ROBERT T. LINCOLN, *President*.

G. B. F.

Attest:

A. S. WEINSHEIMER, *Secretary*.

[Seal American Surety Company of New York.]

THE AMERICAN SURETY COMPANY
OF NEW YORK,
By J. R. MULVANE,

Resident Vice President.

Attest:

H. E. VALENTINE,
Resident Assistant Secretary.

Approved:

W. A. JOHNSTON,

*Chief Justice of the Supreme
Court of the State of Kansas.*

85 *Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.*

The first quarterly meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Wednesday, January 16, 1907, at 12 o'clock noon.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees of the American Surety Company of New York:

"GENTLEMEN: The Committee appointed by the Executive Committee of this Company at their meeting held Wednesday, December 19, 1906, for the purpose of nominating officers of the Company, * * * for the ensuing year, beg leave to report as follows:

"We nominate for * * *

Place.	Res. vice presidents.	Res. asst. secretary.
Topeka, Kansas.....	John R. Mulvane	H. E. Valentine
	E. L. Copeland	Ralph E. Valentine
	Wm. Macferran	

* * * * *

"Whereupon, it was

"Resolved, that the Secretary be authorized to cast one ballot on behalf of the Trustees present for the officers, members of the Executive Committee, and for the members of the Committee on Accounts, as recommended by the Nominating Committee for the ensuing year; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year.

* * * * *

"The following resolution was adopted:

"Resolved, that the Resident Vice-Presidents be and they hereby are, and each of them is hereby authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by the Resident Assistant Secretary."

* * * * *

STATE OF NEW YORK, *County of New York*, ss:

I, F. J. Parry, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are

set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 21st day of Mar., 1907.

[Seal American Surety Company of New York.]

F. J. PARRY,

Assistant Secretary.

[Endorsed:] Supersedeas Bond. Approved and filed Jun- 29, 1907. D. A. Valentine, Clerk Supreme Court.

86 The original of the foregoing supersedeas bond was lodged with the clerk of the supreme court of the state of Kansas, on June 29th, 1907, and the following indorsement made thereon:

Supersedeas Bond, Approved and filed June 29th, 1907. D. A. Valentine, Clerk of Supreme Court.

87 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Supreme Court of the State of Kansas, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of Kansas, before you, being the highest court of law and equity in said State, in which a decision could be had in said suit between The State of Kansas, *ex rel.* C. C. Coleman, Attorney-General of said State, plaintiff, and The Pullman Company, a corporation, defendant, wherein a right, privilege and immunity were and are claimed under the Constitution and statutes of the United States, and the decision was against the right, privilege and immunity claimed thereunder, a manifest error hath happened to the great damage of said The Pullman Company, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be given, that under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at Washington on or before the 29th day of July, 1907, next, in said Supreme Court, to be then and there held, to the end that the record and proceedings aforesaid being inspected, said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the

Supreme Court of the United States this 29th day of June,
88 in the year of our Lord one thousand, nine hundred and
seven.

Issued at office in the city of Topeka, with the seal of the Circuit
Court of the United States for the First Division of the Judicial Dis-
trict of Kansas, dated as aforesaid.

[The Seal of the Circuit Court of the United States, District
of Kansas, 1862.]

GEO. F. SHARITT,
*Clerk Circuit Court United States, First Division
of the Judicial District of Kansas.*

Allowed this 29th day of June, 1907.

W. A. JOHNSTON,
Chief Justice.

[Endorsed:] Writ of error. Filed June 9, 1907. D. A. Valen-
tine, Clerk Supreme Court.

89 The original of the foregoing writ of error was lodged with
the clerk of the supreme court of the state of Kansas on June
29th, 1907, and also at the same time and place a copy thereof for
the defendant in error the State of Kansas, said copy being addressed
to the State of Kansas by F. S. Jackson its attorney general. The
following endorsement was made upon said original writ and upon
each copy:

Writ of error: filed June 29th, 1907. D. A. Valentine, Clerk of
the supreme court of Kansas.

90 The United States of America to the State of Kansas, on the
Relation of C. C. Coleman, Attorney-General of the State
of Kansas:

To the Attorney-General of the State of Kansas:

You are hereby cited and admonished to be and appear at the
Supreme Court of the United States, to be held at Washington, D. C.,
within thirty days from the date hereof, pursuant to a writ of error
filed in the Clerk's office of the Supreme Court of the State of Kansas,
wherein The Pullman Company is plaintiff in error, and The State
of Kansas on the relation of C. C. Coleman, Attorney-General, is
defendant in error, to show cause, if any there be, why the judg-
ment rendered against said plaintiff in error as in said writ men-
tioned, should not be corrected, and why speedy justice should not
be done in that behalf.

Witness, the Honorable W. A. Johnston, Chief Justice of the Su-
preme Court of the State of Kansas, this 29th day of June, A. D.
1907.

[Seal Supreme Court, State of Kansas.]

W. A. JOHNSTON,
Chief Justice of the Supreme Court of Kansas.

Attest:

D. A. VALENTINE,
Clerk Supreme Court.

I accept service of the above this 29th day of June, A. D. 1907.

F. S. JACKSON,
Attorney-General of the State of Kansas.

[Endorsed:] Citation. Filed Jun- 9, 1907. D. A. Valentine,
clerk supreme court.

91 In the Supreme Court of the State of Kansas.

No. 14691.

THE STATE OF KANSAS on the Relation of C. C. COLEMAN, Attorney-
General, Plaintiff,

vs.

THE PULLMAN COMPANY, a Corporation, Defendant.

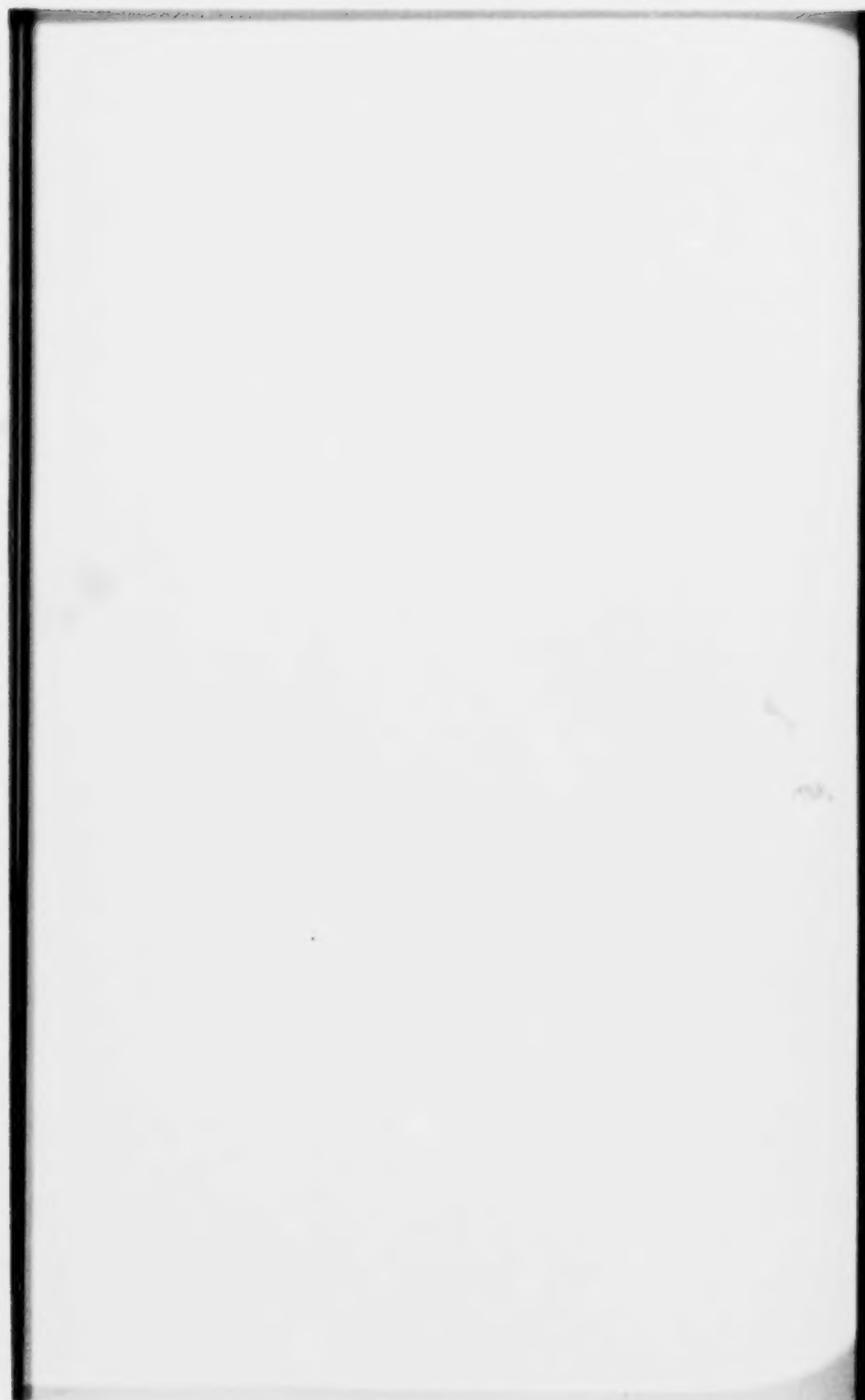
Pursuant to a writ of error issued out of the United States Circuit Court for the District of Kansas on the — day of June, A. D. 1907, and directed to the Supreme Court of the State of Kansas, and in obedience to the command thereof, I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas, do herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and all proceedings of this Court, in the within entitled cause, with all things concerning the same, together with the original writ of error and citation with acceptance of service thereof, hereto attached.

Witness my hand and the seal of the Supreme Court of Kansas hereto affixed at my office in Topeka this 29th day of June, A. D. 1907.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

Endorsed on cover: File No. 20,784. Kansas, supreme court, Term No. 381. The Pullman Company, plaintiff in error, *vs.* The State of Kansas *ex rel.* C. C. Coleman, attorney general of said state. Filed July 9th, 1907. File No. 20,784.



Office Supreme Court, U. S.
FILED.

JAN 23 1909

JAMES H. MCKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES,

THE PULLMAN COMPANY,

Plaintiff in Error,

vs.

THE STATE OF KANSAS, ex rel. C. C.

COLEMAN, ATTORNEY GENERAL,

Defendant in Error.

No. 125. 5

ON WRIT OF ERROR TO SUPREME COURT OF
STATE OF KANSAS.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

CHARLES BLOOD SMITH,

ATTORNEY FOR PLAINTIFF IN ERROR.

FRANCIS B. DANIELS,

GUSTAVUS S. FERNALD,

OF COUNSEL.

BARNARD & MILLER PRINT, CHICAGO.



IN THE
Supreme Court of the United States,

THE PULLMAN COMPANY,	}	No. 125.
<i>Plaintiff in Error,</i>		
<i>vs</i>		
THE STATE OF KANSAS, EX REL.		
C. C. COLEMAN, ATTORNEY GENERAL,		
<i>Defendant in Error.</i>		

ON WRIT OF ERROR TO SUPREME COURT OF
STATE OF KANSAS.

Brief and Argument of Plaintiff in Error.

STATEMENT OF CASE.

This is a writ of error to the Supreme Court of the State of Kansas, complaining of the error of that court in rendering a judgment of ouster in a *quo warranto* proceeding originally brought in that court. The subject of the action is the right of the plaintiff in error, The Pullman Company, to do an intra-state or domestic business in the State of Kansas.

The case was decided in the State Supreme Court upon the pleadings, the court sustaining a demurrer

filed by the state to the answer and amended answer of the company to the petition filed by the state.

Except as hereinafter indicated, the case presents substantially the same questions that are involved in case No. 118, *The Western Union Telegraph Company, Plaintiff in Error, v. The State of Kansas, ex rel.*, which we apprehend will be submitted at about the same time this case is submitted.

Both of these cases were submitted to the Supreme Court of Kansas at the same time and upon the same argument, and that court rendered its decision against both companies upon substantially the same grounds.

We desire the court to consider upon the hearing of this case the brief filed by counsel in the case of *The Western Union Telegraph Company*, which includes the citation of substantially all the authorities upon the points there involved so far as such brief applies.

One point in the *Western Union* case argument, not applicable in this case, is that in the *Western Union* case a reason exists for the limitation upon the power of the state sought to be exercised in the proceeding against the *Western Union* in the Act of Congress of 1866, and the national purposes involved therein with respect to telegraph companies.

The petition filed against the company on behalf of the state alleges in substance the organization of *The Pullman Company* under the laws of the State of Illinois, and that it has no other corporate rights and privileges in Kansas than those granted by the general laws of the state concerning foreign corporations, together with such corporate powers, rights

and franchises as the company might have under the laws of the United States as an agency of interstate commerce, and for carrying on business between the states.

That the company was organized for the purpose of transacting the business of a sleeping, parlor and dining car company, which business is operated by furnishing sleeping cars, parlor cars, tourist cars and dining cars to railroad companies in operating their railroads and railways; The Pullman Company reserving to itself the right to charge a certain price for the use of reserved seats in the cars by day, and sleeping berths during the nighttime, and in letting to railroad passengers who desire the same additional accommodations furnished in the cars of The Pullman Company of reserved seats in the daytime and sleeping berths by night, and in receiving and collecting charges, fees and pecuniary compensation for such services, rentals and accommodations. That the business of the company extended into every part of the State of Kansas where every important railroad is operated, and that such business of the company is transacted through the agents of the company within the state.

It further alleges that the company presented to the Charter Board of the State of Kansas its application to transact its business within the state as a foreign corporation, and that such application was accompanied by a certified copy of its charter and articles of incorporation; that it also set forth the place where its principal office and place of business was located, and other requirements under the terms of the act, and that by its application it appears it

was capitalized for seventy-four millions of dollars, fully paid up in cash. In fact, it admits a compliance by the company with all the requirements of the statutes, except that of paying the charter fee placed upon its entire capital stock.

It charges that the Charter Board granted the application of the company, but provided the certificate of authority should not issue until the company had paid \$14,800, being the charter fee provided for a corporation of seventy-four million dollars' capitalization. That in this order made by the board, the board provided that nothing in the order or in the requirement for the payment of charter fees should be applied to or be construed as restricting in anywise the transaction by the company of its interstate business, but the same related only to the business of said company to be transacted wholly within the State of Kansas.

The petition further charges the refusal and neglect of the company to pay the charter fee, and that therefore no authority has been granted to the company to transact business within the state, and that the company is without authority to transact any business within the State of Kansas.

It charges that notwithstanding its lack of authority to transact business within the State of Kansas, the company has continuously, since the 18th day of April, 1905, exercised and still continues to exercise within the State of Kansas, corporate powers and franchises not conferred upon it by law, and that during such time it has continued its business as a corporation within the State of Kansas by causing its sleeping, parlor, tourist and dining cars to

be transported over the roads and tracks of all the railroads within the State of Kansas being drawn by the engines and trains of said railroads, but said cars remaining in the possession, control, and under the operation of agents of the company by letting, leasing and hiring to passengers on said railroads the accommodations of the various kinds of cars from points within the State of Kansas to other points within the State of Kansas, and by serving on its dining cars meals to railroad passengers within the State of Kansas, and by receiving and collecting money from railroad passengers for said dining car, sleeping car and parlor car services; and that said business has been carried on upon every railroad of importance within the state between the various cities and stations of said state lying upon the lines of said railroads, and that by reason thereof the company has violated the laws of Kansas.

The petition asserts that the state makes no complaint of any act of the company whereby it performs any business constituting interstate commerce or business transacted between the states, nor on account of its receiving and transporting in its cars passengers from the State of Kansas into the other states, and from other states into and through Kansas, but that the complaint refers only to and concerning business of the company transacted wholly within the State of Kansas.

In this petition the state asks that the company be ousted of and from exercising within the State of Kansas any of its rights and franchises, etc.

The answer of the company admits that it complied with the provisions of the statute in every re-

spect, except paying the charter fee of \$14,800, and admits generally that it still continues to transact its business in the State of Kansas, and raises the same questions in regard to the invalidity of the act and the answer contains other allegations similar to those contained in the answer of the Western Union in its case.

The answer in this case, however, raises some questions which we desire the court to consider, in addition to those presented in the Western Union case, challenging the exercise of the power of the state. That among other defenses the plaintiff in error alleged in the fifth paragraph of its answer as follows:

"Said defendant alleges that by far the greatest part of its business, indeed almost its entire business done in the State of Kansas, is of an interstate character, in that it undertakes to furnish continuous service and accommodation in sleeping cars in the form of seats by day and sleeping berths by night, together with all the facilities, comforts and conveniences of a sleeping car, to railroad passengers from the point of initiation of such service without the State of Kansas to and into the State of Kansas, and from points within the State of Kansas to points without the State of Kansas. In many, if not most, instances such service is continuous and unbroken, under the contract made with said passengers, into and through several states; that such service is analogous in such case, so far as its extent is concerned, to the service of the railroad company in the transportation of passengers upon their several tickets; such passengers riding upon said train upon interstate tickets furnished by the railroad company and contracting with defendant for a continuous interstate sleeping car service; and

said defendant avers that it was specifically chartered to engage in carrying on such interstate business."

And, further, in the sixth paragraph of its answer, as follows:

"Said defendant further avers that its business in furnishing sleeping car accommodations is coextensive with the United States and Canada, and that its lines of sleeping car accommodations are for the most part, if not entirely, coterminous with the great trunk lines of the United States over which its sleeping cars under contracts and agreements with the railroad companies are run, extending in some instances from the Atlantic to the Pacific, from the Great Lakes to the Gulf, and without exception so far as the lines passing through the State of Kansas are concerned, traversing more than one state."

And in its seventh paragraph as amended, as follows:

"That under its charter the defendant company is also authorized to engage in the business of manufacturing, particularly of railroad cars of all kinds and classes, including ordinary passenger cars and all kinds of freight cars, and cars for use upon electric or trolley lines. That said The Pullman Company is one of the largest manufacturers of railroad freight cars in the United States, or perhaps in the world; that a very large portion of its business is devoted to such manufacture, and it fills contracts annually for many thousands of all kinds of cars for the transportation of freight, box cars, cattle cars, coal cars, flat cars and cars of all descriptions used in freight transportation; that it carries on this business of manufacturing only in the State of Illinois, and has large manufacturing plants of great value located in the Town of Pullman in the State of Illinois; that of its to-

tal capital stock a considerable part is employed in its manufacturing business transacted wholly within the State of Illinois; that it manufactures sleeping cars, parlor cars, tourist or emigrant cars, and some dining cars. Of the greater number of these latter classes of cars it retains ownership and furnishes them to railroad and railway companies in operating their railroads and railways; and in so furnishing these cars to railroads and railway companies The Pullman Company reserves the right to charge a certain price for the use of reserved seats therein by day and sleeping berths during the nighttime. A relatively small portion of these cars both sleeping and emigrant cars, and possibly some parlor cars, are furnished to the railroads which use them to or into, through and out of the State of Kansas, but of the total capital of The Pullman Company in use in its business aforementioned and described, relatively a very small part enters into or is employed in such last described service into and through the State of Kansas."

By the twelfth paragraph of the answer as amended it alleges:

"Said defendant further admits that it has continuously since April 5, 1905, and still continues to exercise within the State of Kansas the right to do domestic business in the manner and form set forth and described in said plaintiff's petition, but expressly denies that the exercise of such powers and franchises is derived from or dependent upon the laws of Kansas; and denies that it has exercised such powers regardless of the laws of the State of Kansas, or without authority from any lawfully constituted authority of the State of Kansas, or that it has done so without the payment of any fees in such case made and provided; but admits that it continues openly and avowedly to transact its said business as a sleeping car company within

the State of Kansas, and to receive, charge and collect fees for such service from the citizens of the State of Kansas without the payment of the so-called charter fee sought to be imposed in this cause; and admits that it openly and avowedly refuses to pay the same; but denies that by its acts and doings, as hereinbefore admitted, it has, as charged in said plaintiff's petition, 'violated and disregarded the laws of this state' and further denies that all the aforesaid business was performed by said defendant, and all the fees and charges for the transaction of such business collected by it for said services had been done, performed, collected and received in violation of and contrary to the laws of the State of Kansas; and further denies that this defendant now continues from day to day to carry on and exercise its said corporate franchises within the State of Kansas in violation of the laws thereof and in total disregard of the provisions of the law applicable in such case, to the great and irreparable injury of the State of Kansas and the people thereof, or any such matter or thing. But said defendant on the contrary alleges as follows:

That it, said The Pullman Company, was chartered by the State of Illinois to do a general sleeping car business throughout the United States, such business so authorized being domestic to the extent that it was wholly transacted within the limits of any particular state, and interstate in the respect that it was transacted between the states; that under these charter rights and privileges and franchises it entered the State of Kansas shortly after the Pullman sleeping car was invented and furnished its cars to the first railroad traversing the state or any part thereof, to wit: the Missouri Pacific between St. Louis and Leavenworth, and afterwards to the Union Pacific, the Burlington, the Atchison, Topeka & Santa Fe, and the Rock Island roads, in the order of their construction, and as soon as sleeping cars were

employed by them for the accommodation of their passengers; that as the business of said railroads has extended and grown, it has continuously and unremittingly built and furnished and run said cars so far as the sleeping car element of such business was concerned; that by the use of said cars, sleeping car accommodations continuous in their character have ever since been furnished to citizens of the State of Kansas extending to all parts of the west and to the Pacific seaboard, and through tickets have been furnished for such accommodations with not to exceed one change by the way of Chicago, St. Louis, and other great cities to the Atlantic seaboard and to the north.

And this defendant alleges further that by laws passed relating to private corporations, and especially by laws having reference to sleeping car companies, said defendant was induced and invited to engage in the sleeping car business into and through the State of Kansas, and to thereby furnish to the citizens of the State of Kansas sleeping car accommodations coextensive with railroad facilities upon all the trunk lines entering into or traversing the State of Kansas, and that upon the faith of such invitation and before the statute under which plaintiff claims the right to exact the charter fee in this suit was enacted, contracts were made involving the expenditure of many thousands of dollars to furnish sleeping car accommodations into and through the State of Kansas upon the railroad lines thereof; that all of such money was expended in full faith and confidence in the laws already enacted in the State of Kansas for the furtherance and encouragement of such business, and also in the full faith that said company would have the equal protection of the laws of the State of Kansas and the fair, equitable and equal treatment required by the constitution of the State of Kansas in the matter of taxes and other public charges imposed upon it.

And said defendant denies that the State of Kansas has ever enacted any law that authorizes or justifies the institution of this proceeding; but on the contrary thereof, said defendant alleges that by the laws of the State of Kansas said The Pullman Company is now and has at all times been required to receive and accommodate all passengers asking for sleeping car service, and that it cannot if it would omit or withdraw from the due performance of such public duty.

And said defendant further alleges that there is no power or authority by law granted or anywhere to be found in the statutes of Kansas, either to the Charter Board or to the courts of said state, to absolve said defendant from such public duty or to exclude or oust it from the due performance of the same.

That by Chapter 84 of the General Statutes of Kansas of 1905, the Board of Railroad Commissioners has been given the general supervision of all railroads operated by steam within the state and of all sleeping car companies. It is further declared by said act that it shall be unlawful for any railroad company or other common carrier to grant any special privileges to any person, firm or corporation, either in the way of preference in furnishing cars, side track facilities, sites for elevators, mills or warehouses, or any other form of preference, privilege or discrimination.

That the said railroad companies providing for sleeping car facilities upon their several lines have entered into contracts with said The Pullman Company whereby there are turned over by said defendant company to the possession of the railroad companies a sufficient or agreed number of sleeping cars to supply the demand for such facilities upon such railroads; that under such agreement the railroad companies have an absolute right of disposition as to where said cars shall be operated and the same are to be used and are used in the forma-

tion of first-class passenger trains; that The Pullman Company retains the ownership of said cars under the terms of said contracts and reserves as compensation for their use the right of furnishing sleeping car facilities and accommodations to passengers upon said railroads holding first-class passenger tickets who may present such tickets and demand such accommodations, furnishing conductors and porters for the special and limited service of providing such sleeping car facilities and accommodations.

That under the laws of the State of Kansas as above set forth such facilities must be furnished by the railroad companies if at all without any form of preference, privilege, or discrimination to all first-class passengers applying for the same and willing to pay the fees for the same, whether such passengers be intrastate passengers, so-called, or interstate passengers.

That under the terms of said contracts and agreements of said The Pullman Company with the said railroad companies the said railroad companies are given the exclusive control and dominion of said sleeping cars while in use by them and the same are operated by the said railroad companies; the conductors and porters of defendant company going upon said trains for the exclusive purpose of aiding in furnishing to the passengers of said railroad companies sleeping car facilities and privileges and attending to the comforts and conveniences of the railroad companies' passengers upon the sleeping cars; that The Pullman Company in this respect is an agency of the railroad company acting at all times under its supervision and control, and is bound to furnish such sleeping car facilities and privileges to all applying for the same without discrimination.

Said defendant, further answering said plaintiff's petition, says, that it has contracts with all the railroad companies operating through lines in the State of Kansas of the above de-

scribed nature, whereby it undertakes to furnish sleeping cars and in addition proper **attendance and service** for the public traveling upon each of such railroads and demanding and paying for the sleeping car facilities and by the terms of said contracts with said railroad companies it undertakes and agrees to furnish to the public and all the public holding first-class passenger tickets without discrimination of any sort or nature, equal facilities upon such sleeping cars upon the payment of the usual and ordinary tariff charges for such service; and by said contracts said defendant company is expressly forbidden to withhold such privileges from any properly conducted passenger, provided with the necessary transportation; that under and by the terms of their several contracts said The Pullman Company cannot renounce or withdraw from the furnishing of such facilities from those desiring to employ and use the same wholly within the State of Kansas; that the above several contracts between said railroad companies and The Pullman Company were all made long prior to the enactment of the law, the provisions of which form the basis of the present action and proceeding; that such contracts are legal, valid and proper, and in harmony and compliance with the laws of the State of Kansas then existing or since enacted with respect to the duties and obligations of said The Pullman Company and the several railroad companies to the public.

And said defendant specially pleads that the relief sought in this action if granted and the defendant company ousted and excluded from furnishing sleeping car facilities to the public and all the public, without discrimination and at all times, would be in violation of the **constitution of the United States** in that it would impair the obligation of said existing contracts between said The Pullman Company and said railroad companies; and said defendant espe-

cially invokes the protection of that provision of the Federal Constitution.

And said defendant, further answering, says that by reason of the existence of said contracts and the mutual obligations involved therein, and especially the obligation to maintain an equality of privilege between all passengers upon the railroad trains to which Pullman cars are attached, whether the same be domestic or interstate passengers, there appears to be, and said defendant avers there is, a defect of parties to this proceeding and that this court cannot pronounce a judgment which shall abrogate, annul or impair any obligation of said contracts without the appearance of all the railroad companies operating said Pullman cars in the State of Kansas as parties thereto."

That by the fifteenth paragraph of the company's answer it alleges:

"That by the laws of the State of Kansas all sleeping, dining, palace and other cars that make regular trips over any railroad in this state and are not owned by such railroad company are required to be listed by the manager, agent, or conductor, or other person having such cars in charge, and return made to the state auditor the same as is required of railroad companies, and the company operating or using such cars shall be held liable for the taxes due thereon.

That under the requirements of this statute the defendant has continually paid taxes to the State of Kansas upon all of its cars at a valuation levied by the State Board of Railroad Assessors; that the same cars pay taxes in other states through which they run, and that the aggregate of such tax upon its business is large and onerous; that the total valuation of such cars upon the last assessment is \$290,291. If, therefore the tax sought to be exacted as a condition precedent to the doing of domestic

business in this state rested only, as it does in the respect of a domestic corporation, that is within the taxing jurisdiction in this state, the imposition of the tax sought to be imposed by the State of Kansas, assuming the acts of the Charter Board to be legal and regular, would be many thousand per cent. less than the tax sought to be imposed by the state upon the defendant company. And said defendant further alleges that to require this defendant as a condition precedent to continue one part of its business within the state to pay an unreasonable tax of \$14,800, the same being based upon and measured with reference to the capital employed by this defendant in the United States and foreign countries in all of its business, when other persons and corporations are permitted to engage in such business within said state without payment of such a tax, the said State of Kansas thereby denies to the defendant the equal protection of the laws. And this defendant hereby specially pleads this provision of the Constitution and invokes the protection of the same."

To the answer as amended the State filed a general demurrer and the case was submitted upon the pleadings.

On the 11th day of May, 1907, the Supreme Court of Kansas sustained the demurrer to the answer and entered judgment against plaintiff in error. (Rec., p. 29.) The judgment is as follows:

"Wherefore, it is decreed, ordered and adjudged that the defendant, The Pullman Company, a corporation, be ousted, prohibited, restrained and enjoined from transacting any and all corporate business of a domestic character within the State of Kansas and that it be ousted, prohibited, restrained and enjoined from transacting intrastate business in Kansas as a

corporation. It is further ordered, and decreed that this judgment shall in no wise affect the interstate commerce of the business of this defendant, nor restrict it in the execution thereof, and it is further ordered and provided that this decree shall not affect any of the contracts, obligations, or corporate duties of this defendant corporation to or with the Government of the United States in any manner whatsoever."

ASSIGNMENT OF ERRORS.

I.

The Supreme Court of the State of Kansas erred in holding that Chapter 10 of the Laws of 1898, as amended by Chapter 125 of the Laws of 1901, constituted a regulation of foreign corporations engaged largely in the business of interstate commerce; and in further holding that it was not violative of Section 8 of Article 1 of the Constitution of the United States, and in denying the protection of said constitutional provision invoked by the defendant (plaintiff in error here) upon the trial.

II.

The Supreme Court of the State of Kansas erred in holding that the fact that the business of the defendants was largely interstate commerce constituted no defense to plaintiff's petition, and in further holding that the Charter Board under said act might, without any specific statute regulating intra-state or domestic commerce, segregate the intra-state or domestic business from the whole business done by the corporation and impose upon it the license fee designed by statute and so definitely expressed to be exacted from the corporation as a whole to transact any business of any sort or character within the state.

III.

The Supreme Court of the State of Kansas erred in holding that the provisions of the Act of 1898 as amended by Chapter 125 of the Laws of 1901, in so far as such act required foreign corporations engaged largely in the business of interstate commerce to pay the charter fee therein provided, does not constitute a regulation and restriction upon interstate commerce within the prohibition of the Constitution of the United States.

IV.

The plaintiff in error being an Illinois corporation, employing a portion of its capital stock in the State of Kansas and other portions of its capital stock elsewhere in interstate business wholly between other states, such interstate business conducted in the State of Kansas and the capital stock employed therein having no organic relation to or physical connections one with the other, the Supreme Court of the State of Kansas erred in holding that the provisions of the law described in the last assignment of error requiring payment of a charter fee as a condition precedent to doing business within that state, when applied to the defendant (plaintiff in error here) and to its entire capital stock, including that portion so employed in interstate business wholly without the State of Kansas and between states other than Kansas and without the organic relation or physical connection stated, was not a burden imposed by the State of

Kansas upon interstate commerce and in further holding that such imposition did not constitute a regulation and restriction upon commerce between the states in contravention of the Constitution of the United States, the protection of which was especially invoked in that behalf by the defendant (plaintiff in error here).

V.

The Supreme Court of the State of Kansas erred in its judgment in holding and deciding that the said Charter Board had power to withhold the certificate of authority of the defendant company (plaintiff in error here) to do business in the State of Kansas, as set forth in said order of said Board as the same appears in the petition of said State, and in holding that the making of said order was the exercise of any lawful authority or power imposed upon, vested in, or granted to said Charter Board by the State of Kansas in that behalf, and could or did exempt commerce between the states from the burden of the charter fee imposed, and in not holding as requested and prayed for by said defendant (plaintiff in error here) that the action taken by the Charter Board as above stated was without warrant of law, illegal, nugatory and void.

VI.

The Supreme Court of the State of Kansas erred by its judgment in holding that the State could impose a charter fee as a condition precedent to the

granting of permission to a foreign corporation to do business within the state which was largely and almost entirely engaged in the business of interstate commerce; and in holding further that in dealing with such foreign corporation it could deal with it differently from other corporations in the respect that without any action upon the part of the state legislature warranting or authorizing it so to do, it could exclude such corporation from doing intrastate or domestic business.

VII.

The Supreme Court of Kansas erred in its judgment in holding that it could supply the want of legislative act or direction by mere judicial interpretation, and in holding that the act in this respect was subject to interpretation or could be dealt with or held or construed in any manner otherwise than according to its plain import.

VIII.

The Supreme Court of the State of Kansas erred in holding that for refusing to pay a license tax imposed as a condition precedent for all corporations to do business, the Charter Board of Kansas, without legislative warrant, could impose the entirety of such tax upon the right or privilege to do intrastate or domestic business, and in holding that the court by interpretation could justify such exaction.

IX.

The Supreme Court of Kansas erred in deciding that for failure to comply with the provisions of Chapter 10 of the Laws of 1898, as amended by Chapter 125 of the Laws of 1901, a corporation engaged in interstate commerce might be ousted from the privilege of engaging in intrastate business.

X.

The Supreme Court of the State of Kansas erred in holding that the foregoing statute was not obnoxious to the provisions of the Constitution of the United States granting to Congress the exclusive power to regulate commerce between the states and with foreign nations.

XI.

The Supreme Court of the State of Kansas erred in holding that it was the intention of the legislature that the law should apply to foreign corporations that were doing business in the state at the time it took effect; and in further holding that such license tax might be imposed upon The Pullman Company notwithstanding the allegations of the twelfth paragraph of its answer, which were admitted by demurrer, and that those allegations hereunto appended constituted no defense to this proceeding, gave said The Pullman Company no vested rights, relieved it from no obligations as a corporation to pay, but subjected it upon the failure to pay the

fee imposed upon it not as a regulation of intrastate or domestic commerce, but as a condition precedent to its doing business as a corporation, to be ousted from the privilege of doing a part of its business in the State of Kansas.

We herewith, for convenience, quote that portion of paragraph twelve of defendant's answer and make it a part of this assignment of error, as follows:

"That it, said The Pullman Company, was chartered by the State of Illinois, to do a general sleeping car business throughout the United States, such business so authorized being domestic to the extent that it was wholly transacted within the limits of any particular state, and interstate in the respect that it was transacted between the states; that under these charter rights and privileges and franchises it entered the State of Kansas shortly after the Pullman sleeping car was invented and furnished its cars to the first railroad traversing the state or any part thereof, to wit, the Missouri Pacific between St. Louis and Leavenworth, and afterwards to the Union Pacific, the Burlington, the Atchison, Topeka & Santa Fe, and the Rock Island roads, in the order of their construction, and as soon as sleeping cars were employed by them for the accommodation of their passengers; that as the business of said railroads has extended and grown, it has continuously and unremittingly built and furnished and run said cars so far as the sleeping car element of such business was concerned; that by the use of said cars, sleeping car accommodations continuous in their character have been ever since furnished to citizens of the State of Kansas extending to all parts of the West and to the Pacific seaboard, and through tickets have been furnished for such accommodations with

not to exceed one change by way of Chicago, St. Louis, and other great cities to the Atlantic seaboard and to the North.

And this defendant alleges further that by laws passed relating to private corporations, and especially by laws having reference to sleeping car companies, said defendant was induced and invited to engage in the sleeping car business into and through the State of Kansas, and to thereby furnish to the citizens of the State of Kansas sleeping car accommodations coextensive with railroad facilities upon all the trunk lines entering into or traversing the State of Kansas, and that upon the faith of such invitation and before the statute under which plaintiff claims the right to exact the charter fee in this suit was enacted, contracts were made involving an expenditure of many thousands of dollars to furnish sleeping car accommodation into and through the State of Kansas upon the railroad lines thereof; that all of such money was expended in full faith and confidence in the laws already enacted in the State of Kansas for the furtherance and encouragement of such business, and also in the full faith that said company would have the equal protection of the laws of the State of Kansas, and the fair and equitable and equal treatment required by the Constitution of the State of Kansas in the matter of taxes and other public charges imposed upon it."

XII.

The Supreme Court of the State of Kansas erred in failing to hold that if the so-called Bush Act was applicable to it at all, it could only be applied to it as a corporation generally, and not as a corporation incidentally and necessarily engaged in doing intra-state or domestic business.

XIII.

The Supreme Court of the State of Kansas erred in holding albeit it was by the court admitted (as appears in syllabus No. 13, prepared and adopted by the court under the law) that the "Bush Act requires that both foreign and domestic corporations shall pay before being authorized to do business, a charter fee computed at a fixed rate upon the amount of their authorized capital stock, irrespective of where such capital stock may be employed," that to enforce such an exaction against the plaintiff in error as a foreign corporation does not deprive such corporation of the equal protection of the laws, although the bulk of its capital may be invested in property outside of the state, which has no organic relation to or physical connection with the capital stock employed or business conducted by such corporation within the State of Kansas, as the same is alleged in the second paragraph of defendant's answer and the first amendment to defendant's amendment to defendant's answer, as follows:

"That said The Pullman Company is one of the largest manufacturers of railroad freight cars in the United States, or perhaps in the world; that a very large portion of its business is devoted to such manufacture, and it fills contracts annually for many thousands of all kinds of cars for the transportation of freight—box cars, cattle cars, coal cars, flat cars, and cars of all descriptions used in freight transportation, all of which business is transacted wholly within the State of Illinois."

XIV.

The Supreme Court of the State of Kansas erred in holding that the Bush Act, so-called, as interpreted by the State Court, was a proper exercise of the police power of the state and within the fair terms and limits of the exercise of such power with regard to a corporation like that of defendant (plaintiff in error here), and in further holding that said act in providing for the collection of revenue from a foreign corporation in the form of a charter fee, such revenue not being specifically levied to defray an expense involved in the exercise of police power or any public expense incidental thereto, was a proper exercise of police power of the state. And in further holding that in the exercise of police power, the state could impose a burden upon the capital stock of the defendant (plaintiff in error here) employed in interstate commerce, as set forth in assignment of error IV, and also upon its capital stock employed exclusively in another state, as set forth in assignment of error XIII.

XV.

The Supreme Court of the State of Kansas erred in holding that the imposition of the charter fee upon a foreign corporation, required by the provisions of the Bush Act, so-called, as a condition precedent to doing business within the state, was not a tax, and in further holding that the state could tax the property of a foreign corporation employed and invested exclusively in another state and could tax

other property of such corporation employed by it in interstate commerce in and between other states, none of which property has any organic relation to or physical connection with the property or capital stock employed by such corporation in the State of Kansas, under the guise of a charter fee as a condition precedent to doing a local or intrastate business in the State of Kansas.

XVI.

The Supreme Court of the State of Kansas erred in holding that a judgment ousting the defendant (plaintiff in error here) from local business for failure to comply with the Bush Act, will not deprive The Pullman Company of property without due process of law.

XVII.

The Supreme Court of the State of Kansas erred in holding that the defendant (plaintiff in error here) was not denied the equal protection of the laws of the State of Kansas, in the respect that the Bush Corporation Act, so-called, applied, as interpreted by said court, in this case retrospectively to foreign corporations engaged interstate commerce and admitted to the state, and in the state prior to its passage in the manner and under the circumstances and conditions set forth in paragraph thirteen of defendant's answer, hereinbefore quoted, and did not apply to domestic corporations organized and existing and doing business in the state prior to the passage of the act.

XVIII.

The Supreme Court of the State of Kansas erred in holding that as to such corporation, admitted to and doing business in the state prior to the passage of the act as described in the last assignment of error, the imposition of a license tax predicated upon the whole of the capital, wherever situated or invested and not confined to the capital invested and employed within the limits of the state, was not a taking of property without due process of law and did not amount to a denial of the equal protection of the laws in that behalf.

XIX.

The Supreme Court of the State of Kansas erred in holding a charter fee based on the amount of capital stock of a foreign corporation to be of the same legal character or effect as a specific sum imposed as a license and condition precedent to doing business within the state, and in further holding that, as the amount of said charter fee was made by law to depend on the amount of capital stock, the state was not limited to the amount of capital stock brought into and employed in the state, and in not distinguishing between a specific license or charter fee as a condition precedent to doing business in the state by a foreign corporation and a fee which by its terms imposed a burden upon the whole capital stock of such foreign corporation and which in this case imposed such a burden upon property employed beyond the limits of the State of Kansas.

and in holding that by the imposition of the latter burden upon the defendant (plaintiff in error here) it would not be deprived of its property without due process of law as prohibited by the Constitution of the United States, the protection of which in that behalf was especially invoked by the plaintiff in error.

XX.

The Supreme Court of the State of Kansas erred in rendering a judgment of ouster in said cause against the defendant (plaintiff in error here).

XXI.

The Supreme Court of the State of Kansas erred in holding that "a judgment ousting The Pullman Company from the franchises of charging and collecting compensation for Pullman accommodations furnished to passengers taken up and set down within the limits of the state does not violate the obligation of its contracts with the railway companies."

XXII.

The Supreme Court of the State of Kansas erred in holding that a state statute imposing upon a foreign corporation, as a condition precedent to doing business in the state, conditions more onerous than those existing when such corporation lawfully entered the state and made a lawful contract with another to do business therein, did not affect and impair the obligation of such contract as prohibited

by the Constitution of the United States, the protection of which was especially invoked in that behalf by the defendant (plaintiff in error here) and in further holding in this case that the plaintiff in error might withdraw from and abandon certain business which it was bound under its contract to continue, and that it could retire from the execution of such a contract in any particular without the consent of the other party thereto.

XXIII.

The Supreme Court of the State of Kansas erred in holding that under the contracts between the defendant (plaintiff in error here) and the several railroad companies named in the answer, the plaintiff in error might not, until they expire, continue the performance of the conditions of the contracts lawfully enforceable against it without complying with terms imposed by the state subsequent to the making of the contracts, as a condition precedent to the performance of a condition thereof within said state, which render such performance more onerous than when the contracts were made.

XXIV.

That the decision and judgment of the Supreme Court of Kansas deprives the defendant of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, the protection of which provision of the Constitution of the United States was specially invoked at the trial.

XXV.

That the decision and judgment of the Supreme Court of the State of Kansas deprived the defendant (plaintiff in error here) of the equal protection of the laws, in violation of the same amendment to the Constitution of the United States, the protection of which provision of the Constitution was specially invoked at the trial.

XXVI.

The decision and judgment of the Supreme Court of Kansas is violative of Section 8, Article 1 of the Constitution of the United States, the protection of which provision was specially invoked by the defendant upon the trial.

XXVII.

The Supreme Court of the State of Kansas erred in denying the defendant (plaintiff in error here) the protection of said provisions of the Constitution hereinbefore set out, and in addition thereto, rendered a judgment in nowise warranted, supported or enjoined by the terms of the Bush Corporation Act, so-called, to wit: Chapter 10 of the Session Laws of 1898, as amended by Chapter 125 of the Laws of 1901, and the plain import of said Act in both text and title afforded no warrant for such construction and interpretation.

XXVIII.

That the legislature of Kansas never passed nor intended to pass, but, on the contrary, intended not to pass, any act regulating the intrastate commerce of foreign corporations, imposing a license tax thereon, and the declaration and decision of the Supreme Court to that effect was wholly without warrant or support of any such legislative act; was wholly judicial legislation, and in that respect not an exercise of the police power of the state and was absolutely nugatory and void.

XXIX.

The Supreme Court of the State of Kansas erred in holding that the legislature did not intend to regulate restrict and burden interstate commerce in the enactment of the so-called Bush Corporation Act, when the plain, manifest, necessary and logical result of the enforcement of the statute, as interpreted by the Supreme Court of the State of Kansas is and will be to so regulate, restrict and burden such commerce.

BRIEF OF POINTS.

While there are numerous assignments of error arising on this record, we think they can be discussed and considered under the following propositions:

I.

THAT THE LEGISLATURE OF KANSAS NEVER PASSED NOR INTENDED TO PASS, BUT, ON THE CONTRARY, INTENDED NOT TO PASS, ANY ACT REGULATING THE INTRASTATE COMMERCE OF FOREIGN CORPORATIONS IMPOSING A TAX THEREON, AND THE DECLARATION AND DECISION OF THE SUPREME COURT TO THAT EFFECT WAS WHOLLY WITHOUT WARRANT OR SUPPORT OF ANY SUCH LEGISLATIVE ACT, WAS JUDICIAL LEGISLATION, AND IN THAT RESPECT NOT AN EXERCISE OF THE POLICE POWER OF THE STATE.

II.

THE STATE CANNOT EXACT AS A CONDITION PRECEDENT TO ITS DOING BUSINESS IN THE STATE A TAX OR LICENSE FEE BASED UPON THE ENTIRE CAPITAL STOCK OF THE COMPANY WHEN MORE THAN NINETY-NINE PER CENT. OF ITS CAPITAL STOCK IS IN USE ELSEWHERE THAN IN THE STATE OF KANSAS AND IS LARGELY EMPLOYED IN INTERSTATE COMMERCE ELSEWHERE THAN IN KANSAS.

III.

THE CONSTRUCTION PLACED UPON SAID ACT OF THE LEGISLATURE BY THE DECISION OF THE SUPREME COURT OF KANSAS RENDERS SAID ACT UNCONSTITUTIONAL AND VOID, BECAUSE, AS SO CONSTRUED, IT IMPAIRS THE OBLIGATION OF CONTRACTS. IT DEPRIVES THE DEFENDANT OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW, AND DENIES TO THE DEFENDANT THE EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE IMPAIRMENT CLAUSE AND OF THE FOURTEENTH AMENDMENT AND OF THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES AND OF THE ACTS OF CONGRESS PASSED IN PURSUANCE THEREOF.

THAT THE LEGISLATURE OF KANSAS NEVER PASSED, NOR INTENDED TO PASS, BUT, ON THE CONTRARY, INTENDED NOT TO PASS, ANY ACT REGULATING THE INTRASTATE COMMERCE OF FOREIGN CORPORATIONS IMPOSING A TAX THEREON, AND THE DECLARATION AND DECISION OF THE SUPREME COURT TO THAT EFFECT WAS WHOLLY WITHOUT WARRANT OR SUPPORT OF ANY SUCH LEGISLATIVE ACT, WAS JUDICIAL LEGISLATION, AND IN THAT RESPECT NOT AN EXERCISE OF THE POLICE POWER OF THE STATE.

It was contended by the company below in its argument before the Supreme Court of the State of Kansas:

First. That the Charter Board legislation of Kansas (Compiled Statutes of Kansas, 1901, Sections 1259 to 1267) upon its true construction did not apply to The Pullman Company, because that company had been for years doing business in Kansas, where as the legislation refers only to foreign corporations

seeking to do business in the state after the passage of said Charter Board Act.

Second. That if said Charter Board legislation did apply to foreign corporations already domiciled in the state, it applied to any such corporation as a unity, and its business as a whole, and that the Charter Board had no power to make the order limiting the effect of such legislation as if it applied only to domestic business of the company.

The Supreme Court of the state held adversely to the company on both of these propositions and construed the act to apply to The Pullman Company as a company seeking to do business in the state, and held that the Charter Board had full authority to make the order limiting the effect of the legislation as if it applied only to the domestic business of the company.

So much of the Charter Board legislation, commonly known as the Bush Corporation Act, that is in controversy in this case is as follows:

Section 1259 of the General Statutes of Kansas, 1901, providing for the creation of a charter board, is as follows:

“There is hereby created a charter board, to be composed of the attorney general, the secretary of state, and the state bank commissioner. The attorney general shall be the president and the secretary of state the secretary of said board.”

Section 1260 provides for the application for a charter and what the application covers. The first paragraph of Section 1260 is as follows:

“Persons seeking to form a private corpora-

tion under any of the laws of this state, or any corporation organized under the laws of any other state, territory or foreign country, *and seeking to do business in this state*, shall make application to said board, upon blanks supplied by the secretary of state, for permission to organize a corporation, *or to engage in business as a foreign corporation in this state.*"

Then follow the provisions relating to such application which are common to both foreign and domestic corporations. The third paragraph of Section 1260 contains the provisions of the application that are peculiar to one made by a foreign corporation, and is as follows:

"If a corporation organized under the laws of another state, territory, or foreign country, and seeking to do business in this state: 1st. A certified copy of its charter or articles of incorporation. 2d. The place where its principal office or place of business is to be located. 3d. The full nature and character of the business in which it proposes to engage. 4th. The names and addresses of the officers, trustees or directors and stockholders of the corporation. 5th. A detailed statement of the assets and liabilities of said corporation, and such other information as the board may require in order to determine the solvency of the corporation. Such statement shall be subscribed and sworn to by the president and secretary, or by the managing officer of said corporation."

Section 3 of the Act of 1898, Sec. 1261 of the General Statutes of Kansas, 1901, is as follows:

"Each application for permission to organize a corporation, or to engage in business in this state as a foreign corporation, shall be accompanied by a fee of twenty-five dollars, to be known as an application fee; and in all cases where such applications are made by corpora-

tions organized under the laws of any other state, territory or foreign country, and as a condition precedent to obtaining authority to transact business in this state, said corporation shall file in the office of the secretary of state its written consent, irrevocable, that actions may be commenced against such corporation in the proper court of any county in this state in which the cause of action arose, or in which the plaintiff may reside, by the service of process on the secretary of state, and stipulating and agreeing that such service shall be taken and held in all courts to be as valid and binding as if due service had been made upon the president or chief officer of such corporation, and shall be executed by the president and secretary of the company, authenticated by the seal of the corporation, and shall be accompanied by a duly certified copy of the order or resolution of the board of directors, trustees or managers authorizing the said secretary and president to execute the same. Every foreign corporation now doing business in this state shall within thirty days from the taking effect of this act file with the secretary of state its written consent as above specified."

Section 5 of the Act of 1898, Sec. 1263, General Statutes of Kansas, 1901, is as follows:

"The charter board shall hold at least one meeting each month, in the office of the secretary of state, and at such other times as may be necessary, subject to call by the secretary. The board shall make a careful investigation of each application and shall inquire especially with reference to the character of the business in which the proposed corporation is to engage, and if the board shall determine that the business or undertaking is one for which a corporation may lawfully be formed, and that the applicants are acting in good faith, the application shall be granted; and the secretary of the board shall issue a certificate setting forth the fact that the

persons named in the application have been authorized by the charter board to form a private corporation as set forth in the application, reciting the proposed name and character thereof. In passing upon the application of a foreign corporation, the board shall also make special inquiry with reference to the solvency of such corporation, and for this purpose may require such information and evidence as they may deem proper. If they shall determine that such corporation is properly organized, in accordance with the laws of the state, territory or foreign country under which it is incorporated, that its capital is unimpaired and that it is organized for a purpose for which a domestic corporation may be organized in this state, the application shall be granted, and the secretary of the board shall issue a certificate setting forth the fact that the application has been granted and that such foreign corporation may engage in business in this state as hereinafter provided."

Section 1264 of the Compiled Laws of 1901 is as follows:

"Each corporation which has received authority from the charter board to organize shall, before filing its charter with the secretary of state, as provided by law, pay to the state treasurer of Kansas, for the benefit of the permanent school fund, a charter fee of one-tenth of 1 per cent. of its authorized capital upon the first one hundred thousand dollars of its capital stock, or any part thereof; and upon the next four hundred thousand dollars, or any part thereof, one-twentieth of one per cent.; and for each million or major part thereof over and above the sum of five hundred thousand dollars, two hundred dollars. The treasurer shall execute his receipt therefor in triplicate, one of which receipts shall be delivered to the party making the payment, one to the auditor of state, and the other shall be indorsed upon the charter; and it shall be un-

lawful for the secretary of state to file or accept for filing any charter or to issue a certified copy of any charter of any corporation required by the provisions of this act to pay a charter fee which does not have such receipt for the proper fee indorsed thereon by the state treasurer. In addition to the charter fee herein provided, the secretary of state shall collect a fee of two dollars and fifty cents for filing and recording each charter containing not to exceed ten folios, and an additional fee of twenty-five cents for each folio in excess of ten contained in any charter. The fee for filing and recording a charter shall also entitle the corporation to a certified copy of its charter. **All the provisions of this act, including the payment of the fees herein provided, shall apply to foreign corporations seeking to do business in this state, except that, in lieu of their charter, they shall file with the secretary of state a certified copy of their charter, executed by the proper officer of the state, territory or foreign country under whose laws they are incorporated; and any corporation applying for a renewal of its charter shall comply with all the provisions of this act in like manner, and to the same extent as is herein provided for the chartering and organizing of new corporations."**

Section 1267 is as follows:

"Any corporation organized under the laws of another state, territory or foreign country and authorized to do business in this state shall be subject to the same provisions, judicial control, restrictions and penalties, except as herein provided, as corporations organized under the laws of this state."

Section 1283 is as follows:

"It shall be the duty of the president and sec-

retary or of the managing officer of each corporation for profit doing business in this state, except banking, insurance and railroad corporations, annually on or before the 1st day of August, to prepare and deliver to the secretary of state a complete detailed statement of the condition of such corporation on the 30th day of June next preceding. Such statement shall set forth and exhibit the following, namely: 1st. The authorized capital stock. 2d. The paid-up capital stock. 3d. The par value and the market value per share of said stock. 4th. A complete and detailed statement of the assets and liabilities of the corporation. 5th. A full and complete list of the stockholders, with the postoffice address of each, and the number of shares held and paid for by each. 6th. The names and postoffice addresses of the officers, trustees or directors and managers elected for the ensuing year, together with a certificate of the time and manner in which such election was held. Such reports shall be made upon and in conformity to blanks prepared by the secretary of state and approved by the charter board. The fee for filing such report and making a certificate that the same has been made and is on file shall be one dollar. The secretary of state may at any time require a further or supplementary report under this section, which shall contain the same information and data as specified in the annual report herein required; and the failure of any such corporation to file the statement in this section provided within ninety days from the time provided for filing the same shall work the forfeiture of the charter of any corporation organized under the laws of this state, and the charter board may at any time thereafter declare the charter of such corporation forfeited, and upon the declaration of any such forfeiture it shall be the duty of the attorney general to apply to the District Court of the proper county for the appointment of a receiver to close out the

business of such corporation; and such failure to file such statement by any corporation doing business in this state and not organized under the laws of this state shall work a forfeiture of its right or authority to do business in this state, and the charter board may at any time declare such forfeiture, and shall forthwith publish such declaration in the official state paper. It shall also be the duty of the president and secretary of any such corporation organized under the laws of this state as soon as any transfer, sale or change of ownership of any such stock is made as shown upon the books of the company, to file with the secretary of state a statement of such change of ownership, giving the name and address of the new stockholder or stockholders, the number of shares so transferred, the par value, and the amount paid on such stock. No transfer of such stock shall be legal or binding until such statement is made as provided for in this act. The record of the secretary of state shall be *prima facie* evidence of the stockholders of such corporations, the number of shares held by each, and the amount paid on each share of capital stock. **No action shall be maintained or recovery had in any of the courts of this state by any corporation doing business in this state without first obtaining the certificate of the secretary of state that statements provided for in this section have been properly made."**

We fully comprehend that this court has determined in numerous cases that it is bound by the construction placed upon the statute of a state by its highest tribunal and that such construction must be accepted here as conclusive. But this general proposition has its exceptions.

It has also been determined by this court that the

general rule of this court is to accept as conclusive the construction placed by the state Supreme Court upon its state constitution. There is an exception, however, to this, which has been constantly recognized, and that is when the question of contract is presented. This exception also exists when this court is reviewing a final judgment of a state court upholding a state enactment alleged to be in violation of the contract clause of the constitution.

It is contended by the plaintiff in error that the statute in question in this case as construed by the Supreme Court of the State of Kansas is in violation of the contract clause of the constitution, and therefore the exception to the general rule exists in this case. Consequently, this court is not necessarily bound by the construction placed upon the state statute by the Supreme Court of Kansas, but upon the record in this case this court is not precluded from putting upon the act of the Kansas legislature, as construed by the Supreme Court of that state, an independent construction.

Sprague v. Thompson, 118 U. S., 90.

Vick Wo v. Hopkins, 118 U. S., 366.

In the case of *Stearns v. Minnesota*, 179 U. S., 232. Mr. Justice BREWER, in speaking for this court, says:

"The general rule of this court is to accept the construction of a state constitution placed by the state Supreme Court as conclusive. One exception which has been constantly recognized is when the question of contract is presented. This court has always held that the competency of a state, through its legislation, to make an alleged contract, and the meaning and validity of such contract, were matters which in dis-

charging its duty under the federal constitution it must determine for itself; and while the leaning is towards the interpretation placed by the state court, such leaning cannot relieve us from the duty of an independent judgment upon the question of contract or no contract.

"In *Douglas v. Kentucky*, 168 U. S., 488, this question was considered at length and by Mr. Justice HARLAN, after a review of some prior cases, the conclusion was thus stated (p. 502):

"The doctrine that this court possesses paramount authority when reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of the contract clause of the constitution, to determine for itself the existence or non-existence of the contract set up, and whether its obligation has been impaired by the state enactment, has been affirmed in numerous other cases. *Ohio Life Ins. Co. v. Debolt*, 16 How., 416, 452; *Wright v. Nagle*, 101 U. S., 791, 794; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S., 683, 697; *Vicksburg, Shreveport, &c., Railroad v. Dennis*, 116 U. S., 665, 667; *N. O. Waterworks Co. v. Louisiana Sugar Co.*, 125 U. S., 18, 36; *Bryan v. Board of Education*, 151 U. S., 639, 650; *Mobile & Ohio Railroad v. Tennessee*, 153 U. S., 486, 493; *Bacon v. Texas*, 163 U. S., 207, 219.' See, also, *McCullough v. Virginia*, 172 U. S., 102, 109; *Walsh v. Columbus, Hocking Valley & Athens Railroad Company*, 176 U. S., 469."

The legislative intent is clear enough from the terms of the act. The act clearly recognizes that there existed in the State of Kansas at the time of its passage both domestic and foreign corporations which under existing laws were authorized to transact corporate business and the act did not seek to disturb their right to continue to do such business, but only imposed some minor obligations with ref-

erence to making reports to state officials. It exacted payment of no money or additional tax for the right of either a foreign or a domestic company to continue its business in the state. An examination of the act clearly shows that the Supreme Court of Kansas placed an improper construction upon its provisions and by judicial legislation caused the act to receive a different interpretation from that evidently intended by the legislature. Section 1260 of the act provides that:

“Persons seeking to form a private corporation organized under the laws of this state, or any corporation organized under the laws of any other state, territory or foreign country, and seeking to do business in this state, shall make application to said board for permission to organize a corporation or to engage in business as a foreign corporation in this state.”

The words “seeking to do business” in this section referring to foreign corporations are immediately connected with the words “seeking to form,” referring to domestic corporations, and clearly contemplate a status to be created and not a status already established. There is the same juxtaposition of the words “permission to organize,” referring to domestic corporations, and “to engage in business,” referring to foreign corporations. These words can only apply to a corporation seeking to organize as a domestic corporation, or seeking to get into the state for the first time to do business or to engage in business as a foreign corporation in the state. Observe, also, that the phrase as to foreign corporations, “*any* corporation organized under the laws of any other state, territory, or foreign country,” applies to any and all such corporations, and not

alone to those whose business is carried on within or confined to the state.

So, again, in Section 1261, as to applications and payment of application fee, the provision is that "in *all cases* where such applications are made by corporations organized under the laws of any other state, territory or foreign country, and as a condition precedent to *obtaining authority to transact business* in this state, said corporation shall file with the secretary of state its written consent, irrevocable, that all actions commenced against such corporations in the proper court," etc., service may be made in a certain way. Observe here that this refers to *all* foreign corporations and not alone to those whose business is confined wholly within the state. No question arises in the present case under said Section 1261, in reference to filing consent to service of process. The point to observe is that the section applies to *all business* of *all* foreign corporations without distinction between those engaged in interstate commerce and those doing solely a domestic business.

So, under Section 1263, it is provided that the charter board "in passing upon the application of a foreign corporation shall make special inquiry with reference to the solvency of such corporation." If they shall determine that such corporation is properly organized in accordance with the laws of the state, territory or foreign country, under which it is incorporated, that its capital is unimpaired, etc. the application shall be granted.

The point to notice here is that this section expressly extends to *all* foreign corporations that make

application to do business in the state, and is not confined to those that propose to do a wholly domestic business.

Section 1264 provides that each domestic corporation *thereafter* organized shall pay a certain charter fee; and then follow the provisions under which the present proceeding by the attorney general is brought, to wit:

“All the provisions of this act, *including the payment of fees herein provided*, shall apply to foreign corporations seeking to do business in this state, except that in lieu of their charter they shall file a certified copy of their charter,” etc.

Note here again, as in all the preceding sections, that this applies to every foreign corporation seeking to do business of any kind in the state, which, of course—(in the language of the Supreme Court of the United States in *Crutcher v. Kentucky* (141 U. S., p. 58), considering a statute in all respects like the one here under examination)—“embraces interstate business as well as business confined wholly within the state (*Ib.*, p. 57), and is a prohibition against the carrying on of such business without a compliance with the state law.” (*Ib.*, p. 57.)

So, again, in Section 1267, the provision is that “*any* corporation organized under the laws of another state,” etc., “authorized to do business in this state, shall be subject to the same provisions,” etc., “except as herein provided as to the corporations organized under the laws of this state.” Here, again, the language is applicable to *all* foreign corporations authorized to do business in the state. And this legislation applies to all foreign corporations

doing "interstate business as well as business confined wholly within the state." There is nothing in this legislation from beginning to end that undertakes to make any separation of interstate and domestic business.

There is nothing in this charter fee legislation from beginning to end that undertakes to classify foreign corporations and confine the provisions of this legislation to corporations doing domestic business, or to confine it to the domestic business of an interstate commercial corporation, as the order of the charter board in this case assumes to do.

The correctness of the foregoing views as to the true construction of the charter board legislation of Kansas is made still clearer by three other important considerations.

(1) The Kansas charter legislation (Sections 1259, 1260, 1261, 1263 1264 and 1267) is not retroactive and does not apply to domestic corporations previously organized, but is limited to those which are *sought* to be organized and formed under the laws of the state *after* the enactment of this legislation, and imposes a charter fee only upon such corporations as shall be *thereafter* organized and shall thereupon apply to the charter board to receive authority to do business in the state. This being so, it is equally true as to foreign corporations, for the language employed is the same, and these sections, therefore, apply only to foreign corporations seeking, after the passage of the Kansas legislation, for the first time to do business in the state. As appears on the record, The Pullman Company had, years and years before this legislation was enacted,

been invited into the state and was doing business in the state at the time of the passage of this legislation, and is not now "*seeking* to do business in the state," or "to engage in business in the state" within the meaning of said legislation. And this legislation no more applies to foreign corporations already in the state and doing business than it does to domestic corporations previously organized and doing business in the state.

(2) The charter fee required by Section 1264 of domestic corporations is required only of corporations *thereafter* organized and the amount of the charter fee is based upon the entire authorized capital of such domestic corporations. So in respect to foreign corporations the fee is based upon their *entire capital* and not alone on that part of their capital which is employed in the state, nor yet alone on that part which is employed alone in domestic business in the state, but is a charter fee based upon their entire capital, showing that the legislature intended to prohibit any foreign corporation, no matter of what character, from doing any business, whether domestic or interstate, or both, without paying the full charter fee, thereby demonstrating that the legislature had in mind the prohibition of a foreign corporation from doing *any* business, foreign or domestic, unless such corporation paid the charter fee.

It is a principle of universal application that statutes imposing taxes or other burdens upon people or upon business, and the enforcement of such statutes by fines and penalties, are strictly construed, and the Kansas legislation must stand or fall by the legislation as the *legislature framed it*.

(3) As above shown, every section of the charter board legislation now in question, applies as respects foreign corporations only to those "seeking to engage in business in the state" *after* the passage of said charter board legislation; and said sections contain no provision making the same applicable to corporations *already* doing business in the state. That this omission to make the said legislation applicable to corporations already doing business in the state, in respect to paying the charter fee, was intentional, appears by reference to said Section 1261 of the General Statutes of Kansas, 1905 (quoted *ante*), which requires that, in all cases where applications are made by a corporation organized under the laws of any other state or foreign country, and as a condition precedent to obtaining authority to transact business in this state, they file their written consent, irrevocable, that actions may be commenced against them in any county in the state; which section commences by providing that "every foreign corporation now doing business in this state shall, within thirty days, * * * file with the secretary of state" the written consent above specified. This express provision that this Section 1261 shall apply to corporations *now* doing business in the state and omitting it in the charter fee section of the legislation, shows, as we have said before that the purpose of the act, as to the charter board legislation, was to confine it, as to foreign corporations, to those *thereafter* seeking to do or engage in business in the state.

By every canon of statutory construction, this statute should be interpreted to operate prospectively and not retroactively.

The Supreme Court of Pennsylvania, in passing upon a statute of that state similar in terms to the provisions of the Kansas statute, gave what we think is the correct construction to be placed upon the Kansas statute. The two statutes are similar in many respects, as well as the circumstances under which the money was sought to be recovered from the corporation by the state. We refer to the case of *Commonwealth v. Danville Bessemer Co.*, 56 Atl. 871, wherein the court says:

“It may fairly be said that by our legislation the company had been encouraged, if not actually invited, to come among us; and, by complying with the statutory conditions of its coming, had paid the only consideration asked by the state for the privilege of doing so. What the state is demanding from the appellee is not a tax, which it could impose, but a bonus, which is the consideration for the grant of a privilege or franchise. *Commonwealth v. Erie & Western Transportation Co.*, 107 Pa., 112. The privilege extended to the appellee by the state, and exercised by it before the passage of the Act of 1901, was to conduct business here. If the legislature could, it is hardly likely that it would, attempt to impose a bonus upon a foreign corporation already doing business here, and for which privilege it had already done all that the state had asked; and it is plain that the Act of 1901 is not such legislative attempt. ‘Nothing short of the most indubitable phraseology is to convince us that the legislature meant their enactment to have any other than a prospective operation.’ *Dewart v. Purdy*, 29 Pa., 113. There is no canon of construction better settled than this: That a statute shall always be interpreted so as to operate prospectively, and not retrospectively unless the language is so clear as to preclude all question as to the intention of the legislature. *Neff’s Appeal*,

21 Pa., 243; *Fisher v. Farley*, 23 Pa., 501; Becker's Appeal, 27 Pa., 52. Lord Bacon expressed concisely the same rule: '*neque enim placet Janus in legibus.*' Retrospective laws generally, if not universally, work injustice and ought to be so construed only when the mandate of the legislature is imperative.' *Taylor v. Mitchell*, 57 Pa., 209. 'Unless such intent is clearly manifest, it will not be presumed that the legislature intended any other than a prospective operation.' *People's Fire Ins. Co. v. Hartshorne*, 84 Pa., 453. Tested by this rule of construction, there is nothing in the first section of the Act of 1901 to indicate the clear legislative intent that it should apply to corporations then employing their capital within the state. The bonus is to be paid by corporations, 'from and after the passage' of the act, 'whose principal office or chief place of business is located in this commonwealth,' that is—corporations which locate their principal office or chief place of business here, and not those which have located it; or corporations 'which have any part of their capital actually employed wholly within this state,'—that is corporations which, after the passage of the act, actually employ any part of their capital wholly within this state, and not those which theretofore employed it. The words cannot be read as the 'clear' and 'indubitable' language of the legislature intending the act to operate retrospectively. By transposing 'from and after the passage of this act,' and reading this clause after the words 'whose principal office or chief place of business is located in this commonwealth, or which have any part of their capital actually employed wholly within this state,' the legislative intent becomes manifest that the act is to affect only those foreign corporations which, after its passage, locate their chief place of business or actually employ any part of their capital wholly within the state. Such transposition can be made, and the section so read, unless

by so doing a clearly expressed intention of the legislature to the contrary will be struck down."

This Kansas legislation must stand and be construed as the legislature of the State of Kansas framed it, and not as it might have been framed or amended by the Supreme Court of that state, and we submit that the language of the act is not susceptible of the construction placed upon it by the Supreme Court of the State of Kansas, and the decision of that court in construing such act violates all canons of statutory construction and is manifestly against the plain terms of the act as declared by the legislature. In the several sections of the act it refers without exception or limitation to *every* foreign corporation, and the prohibition is not against the doing of a domestic business, but against the doing of any business, whether domestic or foreign, or both, without paying the charter fee. We therefore maintain that by the reasonable and necessary construction of this Kansas legislation it appears, as above stated:

That the said charter board legislation applies only to foreign corporations thereafter seeking to do business therein and does not apply to The Pullman Company, which has been continuously doing business throughout the entire history of the state, and was already in the state doing business at the time said legislation was passed.

That if the said charter board legislation be construed as applying to corporations already in the state, it applies to *all* such corporations alike and to *all classes of business* done by such corporations, *both domestic and interstate* alike, and it does not

except from its operation foreign corporations engaged in interstate business nor does it except the interstate business of foreign corporations, and it undertakes to prohibit the carrying on of any business by any foreign corporations, whether state or interstate, except upon the condition precedent of paying the prescribed charter fee. It does not segregate or separate the business of foreign corporations which is domestic from the interstate business of such corporations, but it undertakes to prevent any and every foreign corporation from doing business in the state, domestic or interstate, except upon the condition of previous payment of prescribed charter fees.

We therefore submit that there is no law of Kansas authorizing the Charter Board of Kansas to demand or exact a fee based upon the entirety of the capitalization of The Pullman Company for the doing of a strictly domestic business; nor can any such authority be implied from the statute as it exists. This being true, it brings the case strictly within the rule laid down by this court in *Crutcher v. Kentucky*, 141 U. S., 47, and excludes it from the rule in the cases of *The Pullman Company v. Adams*, 189 U. S., 420 and *Osborne v. Florida*, 164 U. S., 650.

For the additional reason, as we shall hereafter show, that the company cannot withdraw from the doing of or renounce the transaction of the domestic branch of its business, it comes clearly within the rule of *Crutcher v. Kentucky, ubi supra*.

There must be a statute of Kansas imposing a burden upon the doing of a domestic business by a

company engaged in interstate commerce or authority must be given to some subordinate municipality or commission to impose such burden. There is no such statute nor was there any such law until the erroneous interpretation placed upon the statute by the Supreme Court of Kansas. That the plain and proper construction of the statute did not impose upon a foreign company doing business in the state at the time of its passage any liability for charter fee, but on the contrary thereof, the legislature recognized the right of such foreign corporation to continue to do business upon the same terms and under like restrictions as imposed upon domestic corporations existing at the time of the passage of the act, seems to us clear.

By the decisions of this court, three things are held to be necessary to validate a state statute imposing a burden upon the domestic business of a corporation engaged in interstate commerce:

First. As was said in the Crutcher case, it must be enacted in good faith; in other words, it must be apparent that it is a proper tax upon the domestic business merely and not a restriction or burden upon the interstate commerce business of such corporation.

Second. Such tax or imposition upon a corporation must be pursuant to a statute expressly passed for that purpose and carefully limited in that regard. No such statute exists in Kansas or has ever existed with reference to the business of The Pullman Company.

Third. As to a foreign corporation engaged in interstate commerce within the borders of the state,

as appears from this and cognate decisions, the corporation must be under the laws of the state authorized and permitted to withdraw from the doing of a domestic business. If it cannot withdraw from it, but the doing of it is compulsory, then such domestic business becomes of the same nature and is amalgamated with the mass of business done by such corporation, both state and interstate, and under the rule of *Crutcher v. Kentucky*, such tax and imposition is void.

We submit that the extra-judicial construction placed upon the act by the Supreme Court of the State of Kansas whereby it limits the act to the domestic business of The Pullman Company is a forced and improper construction, and that the construction so placed upon the act was wholly without warrant or support of the language of the act and was judicial legislation and in that respect not an exercise of the police power of the state.

THE STATE CANNOT EXACT FROM THE PULLMAN COMPANY, AS A CONDITION PRECEDENT TO ITS DOING BUSINESS IN THE STATE, A TAX OR LICENSE FEE BASED UPON THE ENTIRE CAPITAL STOCK OF THE COMPANY WHEN MORE THAN NINETY-NINE PER CENT. OF ITS CAPITAL STOCK IS IN USE ELSEWHERE THAN IN THE STATE OF KANSAS AND IS LARGELY EMPLOYED IN INTERSTATE COMMERCE ELSEWHERE THAN IN KANSAS.

The conditions imposed by the state upon which a foreign corporation may be admitted to do business therein must be within all the constitutional limitations and provisions applicable to the subject. The state may *exclude* foreign corporations; it may im-

pose terms which in themselves are reasonable or unreasonable; but if by legislative enactment the state determines that it will admit them at all, then the terms of admission must not violate the Constitution of the United States.

Judson on Taxation, Sec. 169.

Insurance Co. v. Morse, 20 Wall., 445.

La Fayette Ins. Co. v. French, 18 How., 404, 407.

St. Clair v. Cox, 106 U. S., 350, 356.

Barron v. Burnside, 121 U. S., 186, 200.

Norfolk & Western R. R. v. Pennsylvania, 136 U. S., 114.

If the language of a statute will permit a construction which does not violate the constitution, such construction will be given it; as in

Osborne v. Florida, *post*.

The power of a state to exclude or to prescribe the terms of admission of a foreign corporation is no greater than the general inherent power of the state to tax property within its limits. In taxing property within its limits the state may not impose a tax which violates the commerce clause of the constitution, the provision which forbids the taking of property without due process of law, or that which forbids the denial of equal protection of the law.

In *Gloucester Ferry Company v. Pennsylvania*, 114 U. S., 196, in dealing with the question of the taxation of capital stock employed in interstate commerce, the court said:

"The power to regulate that commerce,
* * * vested in Congress, is the power, * * *
to determine when it shall be free and when sub-

ject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on and the means by which it may be aided and encouraged." (Opinion, pp. 203-4.)

And in speaking of the transporting companies, the court said:

"And if, by reason of landing or receiving passengers and freight at wharves or other places in the state, they can be taxed by the state on their capital stock on the ground that they are thereby doing business within her limits, the taxes which may be imposed may embarrass, impede or even destroy such commerce." (Opinion, p. 205.)

And again, on page 206:

"It is true that the property of corporations engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, is subject to state taxation, provided always it be within the jurisdiction of the state,"

quoting from *McCulloch v. Maryland*, 4 Wheat., 316, 429, in support of a proposition which the court says may almost be pronounced self-evident, and which has been repeatedly declared since that time.

It is true that in the Gloucester Ferry case the court was dealing with a corporation whose sole business was interstate commerce, but that fact does not affect the principle declared, as applicable to a company like The Pullman Company engaged in both intra and interstate business.

But the court says also, on page 217:

"Reasonable charges for the use of property, either on water or land, are not an interference with the freedom of transportation between the

states secured under the commercial power of Congress. That freedom implies exemption from charges other than such as are imposed by way of compensation for the use of the property employed, or for facilities afforded for its use, or as ordinary taxes upon the value of the property."

We assert that when the State of Kansas, for the privilege of doing *intrastate* business within her limits, attempts to impose a tax upon the capital stock representing the instrumentalities of interstate commerce employed by the plaintiff in error in such commerce between New York City and Tampa, Florida, and between many other places in different states, having no organic relation (other than ownership) to the business done in Kansas, and having no physical connection with the instrumentalities used in Kansas, the state is encroaching upon that freedom of interstate transportation secured under the commerce clause of the constitution, and is asserting the exercise of its powers of taxation beyond its geographical limits, and that such tax, if enforced, would deprive the plaintiff in error of its property without due process of law.

Fargo v. Hart, 193 U. S., 490.

Gloucester Ferry v. Penn., *supra*.

Norfolk & Western R. R. v. Penn., 136 U. S., 114, *supra*.

Ashley v. Ryan, 153 U. S., 436.

Union Transit Co. v. Kentucky, 199 U. S., 194.

An examination of the cases in which license tax laws of different states have been before this court, as to whether they violated the commerce clause of

the constitution or the Fourteenth Amendment, will demonstrate that in no case where this court has sustained a license tax or occupation tax or privilege tax has there been involved the question of the burden thereby imposed upon capital stock or property of a foreign corporation which was actually found to be employed in interstate commerce, *elsewhere than in the state imposing the tax*.

In *Horn Silver Mining Company v. New York*, 143 U. S., 305, there was no finding that the capital stock was so employed. It was not, in fact, employed in interstate commerce.

Cotting v. Kansas City Stock Yards, 82 Fed., 850; op. 852.

U. S. v. Swift, 122 Fed., 529; op. 533.

(In the latter case the Circuit Court distinguishes in the character of the two classes of business done, one where the defendants shipped from their packing house direct to purchasers in other states, and the other class where they shipped from their packing house to their own agents in other states to be sold by the agents but not shipped in pursuance of any sale.)

Kehrer v. Stewart, 197 U. S., 60.

Armour v. Lacey, 200 U. S., 236.

The distinction in this particular between corporations organized to conduct strictly private business and those organized to carry on interstate commerce and which have a *quasi*-public character, is referred to in *New York v. Roberts*, 171 U. S., 658, from which we quote, *post*.

The court has, in many cases, stated the rule to

be that a state may admit foreign corporations to do business within its limits upon such terms and conditions as the state may prescribe, or it may exclude them.

Paul v. Virginia, 8 Wall. 168 (and many cases since).

Only two exceptions or qualifications have been attached to this rule in all the numerous adjudications since *Bank of Augusta v. Earle*, 13 Pet., 519: That the state cannot exclude from its limits a corporation engaged in interstate commerce.

Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S., 1 (and many other cases).

Or a corporation in the employ of the general government.

Stockton v. B. & N. Y. R. R., 32 Fed., 9.

Horn Silver Mining Co. v. N. Y., *supra*.

The court has always guarded with equal strictness any encroachment by the states in the direction of imposing burdens upon, or the regulation of, interstate commerce, and has repeatedly held that no conditions can be imposed by a state which are repugnant to the constitution and laws of the United States.

Ins. Co. v. Morse, 20 Wall., 445-457.

Barron v. Burnside, 121 U. S., 186-200.

The decided cases amply justify the assumption that the court would have added to the two exceptions to the rule just mentioned, the further exception that the state could not, as a condition precedent to admitting a foreign corporation to do busi-

ness "within the state," impose a burden upon interstate commerce itself, if *that* question had ever been directly before the court.

Attention is called to the language of the court in *Fargo v. Michigan*, 121 U. S., 230, 239-240, regarding the assumption by Congress of the duty imposed upon it by the Constitution (to regulate commerce among the several states), in pursuance of which it passed the Act to Regulate Commerce, approved February 4, 1887. This act as amended by act approved June 29, 1906, provides, "The term 'common carrier' as used in this act, shall include * * * sleeping car companies."

The case of *Ashley v. Ryan*, 153 U. S., 436, may be distinguished. In that case the tax or fee imposed was upon what the court held to be, to all intents and purposes, a new corporation, and it was held the corporate fees or taxes due the State of Ohio, for giving existence to the new or consolidated company, was not a tax on interstate commerce and did not extend the taxing power of the state beyond its territorial limits. When the fee was imposed the proposed new company was not in existence. It had no capital stock and could have no property to tax either within or without the state and no interstate commerce to be burdened.

That the rule is different when applied to a transportation company in existence at the time the burden is laid, was held in the Delaware Railroad tax, 18 Wall., 206, where the court said:

"The exercise of the authority which every state possesses to tax its corporations and all their property, * * * *when this is not done*

*by discriminating against rights held in other states, and the tax is not on * * * transportation to other states, cannot be regarded as conflicting with any constitutional power of Congress.*" (Italics are ours.)

From the facts in the case it is quite evident the word "discriminating" is there used in the sense of "burdening."

To say that the state can, by granting to a foreign corporation privileges to do business within the state, acquire the right to regulate interstate commerce, would be to destroy that freedom of such commerce that the Constitution declares shall be maintained except as regulated by Congress.

Fargo v. Michigan, 121 U. S., 230 wherein the court said (243-244):

"But where the business so taxed is commerce itself, and is commerce among the states or with foreign nations, the constitutional provision cannot thereby be evaded, nor can the states, by granting franchises to corporations engaged in the business of the transportation of persons or merchandise among them, which is in itself interstate commerce, acquire the right to regulate that commerce either by taxation or in any other way."

While the states may not burden interstate commerce by taxation, they may tax the instrumentalities of that commerce *located within their limits*, and rolling stock used partly within and partly without the limits of a state may be taxed by the state, first ascertaining the average amount thereof which is constantly within the state in its passage into and through the state, and taxing the average, although engaged in interstate commerce.

Pullman v. Pennsylvania, 141 U. S., 18.

In no case coming before the court has any form of taxation of capital stock employed in interstate commerce been sustained to any greater extent than in the Pullman-Pennsylvania case.

A tax on the capital stock of a corporation is a tax on the property of the corporation represented by the capital stock.

Pullman v. Pennsylvania, supra.

W. U. Tel. Co. v. Atty.-Gen. of Mass., 125 U. S., 530.

Union Transit Co. v. Kentucky, supra.

In Gray on "Limitations of Taxing Power and Public Indebtedness," after citing and commenting on the almost numberless decisions on the classification of taxes, the author summarizes as follows:

"A specific tax on a foreign corporation, measured by the amount of business done, or by the amount of receipts, or earnings, or dividends, is generally a tax on the privilege of doing business in the state. A tax on a domestic or foreign corporation which involves a valuation of property by reference to the amount of capital stock, and an assessment upon such valuation, is generally a property tax."

That a state tax, imposed upon capital stock or property of a corporation employed in interstate commerce, to any extent beyond the proportion employed within the state, as sanctioned in *Pullman v. Pennsylvania, supra*, is a burden upon interstate commerce and a regulation thereof, is sustained by the reasoning of the court in that case, and other cases decided since bear out this contention.

Norfolk & Western Ry. v. Penn., 136 U. S., 114, *supra*.

Postal Telegraph v. Adams, 155 U. S., 688, 696.

In the Circuit Court of the United States for the District of Colorado, in *The People of the State of Colorado v. The Pullman Company*, an action brought to recover a sum claimed to be due under a statute of that state almost identical with the Kansas statute under discussion, decided in 1905, the court (RIXER, J.) held the case was within the principles announced in case of *State Freight Tax*, 15 Wall., 232; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S., 196; *Pickard v. Pullman Southern Car Co.*, 117 U. S., 34; *Leloup v. Mobile*, 127 U. S., 640, and other cases referred to in the opinion, placing his decision upon the rule (quoted, *post*, in *Ashley v. Ryan*) and held that

“where the exaction violates the commerce clause of the Constitution of the United States or involves the assertion of the right of a state to exercise its powers of taxation beyond its geographical limits, the power cannot be sustained, and this is true whether the charge attempted to be laid be viewed as a tax, a license or a fee.”

The Colorado case was not appealed.

The court will look to the substance rather than to forms—to what an enforcement of the law would really do, rather than to what the law itself may *say* it would do.

Ashley v. Ryan, *supra*,

G., H. & S. A. Ry. Co. v. Texas, 210 U. S., 217.

Phila. & S. Steamship Co. v. Penn., 122 U. S., 326.

Postal Tel. Co. v. Taylor, 192 U. S., 64, 73.

Postal Tel. Co. v. Adams, *supra*.

Home Ins. Co. v. N. Y., 134 U. S., 594-598.

In the latter case, the franchise having been granted by the state, the entire capital stock was held a proper measure of the value of the corporate franchise granted.

In *Maine v. Grand Trunk*, 142 U. S., 217, the tax was for the exercise of a corporate franchise granted by the state, and in *Powers v. Michigan*, 191 U. S., 379, it was a tax upon the business and property, but in both these cases the tax was based only upon the mileage proportion *within* the state.

The latest expression of the court on the subject of regulating interstate commerce by state taxation, while considering the two cases last referred to as seemingly a reaction from *Philadelphia & Southern Steamship* case, nevertheless, follows and reaffirms the rule in the latter.

G., H. & S. A. Ry. Co. v. Texas, 210 U. S., 217, *supra*.

The protection from state interference with interstate commerce secured by the Constitution ceases to be of force if the state may do indirectly that which it may not do directly.

Brown v. Maryland, 12 Wheat., 419.

Home Ins. Co. v. N. Y., *supra*, op. p. 598.

Gibbons v. Ogden, 9 Wheat., 1.

A state cannot tax interstate commerce; it cannot tax the earnings therefrom; it cannot tax for the

privilege of carrying it on, nor can it exercise its powers of taxation beyond its geographical limits.

Ashley v. Ryan.

Union Transit Co. v. Kentucky.

Postal Telegraph v. Adams, supra.

Those principles are established beyond question, and their application to the power of the state to burden interstate commerce leads to the logical conclusion, and we think, justifies, as a legal conclusion, the assertion that a state cannot, for the privilege of doing business *within* her borders, tax interstate commerce, as in this case, by a tax laid on instrumentalities thereof located *without* her borders, and not connected either physically or by organic relation (other than ownership) with any property located or business done within the state.

It is as surely a burden on interstate commerce to tax that commerce for the privilege of doing something else as it is to tax one engaged in interstate commerce for the privilege of carrying it on. Such a tax would burden and regulate commerce equally with what was held to be such regulation in case of the State Freight Tax; *Norfolk & Western v. Pennsylvania*; *Crutcher v. Kentucky*; *Picard v. Pullman Southern Car Co.*; *Gloucester Ferry Co. v. Pennsylvania*; *Philadelphia & Southern Steamship Co. v. Pennsylvania, supra*, or any of the other cases in which the attempts of a state to tax interstate commerce have not been sustained.

This court has plainly pointed out the distinction between corporations engaged in interstate commerce and having a *quasi*-public character, and cor-

porations organized to conduct strictly private business.

New York v. Roberts, 171 U. S., 658, wherein it is said (op. p. 661):

"It must be regarded as finally settled by frequent decisions of this court that, subject to certain limitations as respects interstate and foreign commerce, a state may impose such conditions upon permitting a foreign corporation to do business within its limits as it may judge expedient."

And on pp. 664-5:

"When a corporation of one state, whose business is that of a common carrier, transacts part of that business in other states, difficult questions have arisen, and this court has been called upon to decide whether certain taxing laws of the respective states infringe upon the freedom of interstate commerce. * * * (Citing *Pullman v. Pennsylvania* and other cases.) * * * It is not necessary in this case to enter into a subject so difficult, but the cases are referred to as showing the distinction between corporations organized to carry on interstate commerce and having *quasi*-public character, and corporations organized to conduct strictly private business."

It is held not to be a violation of the commerce clause of the constitution for a state to tax, as *property*, the instrumentalities of interstate commerce having a fixed *situs* within her limits, or an average quantity, as in *Pullman v. Pennsylvania*, *supra*, but to entitle a state to tax such instrumentalities there must be attached to them all the conditions necessary to render property subject to taxation, as location, and jurisdiction of the taxing power.

St. Louis v. The Ferry, 11 Wall., 423.

Louisville Ferry v. Kentucky, 188 U. S., 385.

Adams Express Co. v. Ohio, 165 *id.*, 194.

Fargo v. Hart;

Union Transit Co. v. Kentucky;

Gloucester Ferry v. Penn., *supra*.

Any burden laid on such instrumentalities, except under the rule as laid down by this court, is an interference with and a burden upon interstate commerce. Whenever a state attempts to impose such a burden in any form, with the sole exception of regulations necessary to the health and safety of the people, there is a collision between federal and state power and the state regulation must yield.

Pickard v. Pullman Southern Car Co., 117 U. S., 34.

Norfolk & Western Ry. v. Pennsylvania, *supra*.

Crutcher v. Kentucky, 141 U. S., 47.

Postal Tel. Co. v. Adams, 155 U. S., 688 (695, 696).

Gibbons v. Ogden;

Gloucester Ferry Co. v. Pennsylvania;

Fargo v. Michigan;

Phila. & S. Steamship Co. v. Penn.;

Pullman v. Adams, *supra*.

The instrumentalities of commerce are a part of the commerce.

Gibbons v. Ogden, *supra*, and especially the concurring opinion of Mr. Justice Johnson in that case:

"The power (to regulate commerce) embraces within its control all the instrumentalities by which that commerce may be carried

on." *Gloucester Ferry Co. v. Penn.*, *supra* (p. 204).

"Transportation is essential to commerce, and every burden laid upon it is *pro tanto* a restriction." Case of State Freight Tax, *supra* (p. 281).

Vehicles are essential to transportation and cars are essential to some forms of transportation; applied to such forms of interstate transportation, cars are essentials of commerce.

Crandall v. Nevada, *supra*.

Phila. & S. Steamship Co. v. Penn., *supra*.

As was said in *Fargo v. Michigan*, *supra* (op. p. 241):

"The state may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the state."

And so it is that no matter for what the tax is laid, if it is laid on interstate commerce, then that commerce is burdened and regulated.

If one state (other than the home state) may tax the instrumentalities of interstate commerce not located within her limits but largely located and used in all the other states of the Union, as are those of the plaintiff in error, then each state may do the same, thereby taxing *all* the capital stock as many times as there are states, and the aggregate action of all the states would not only burden and impede but actually prohibit and destroy that feature of interstate commerce now carried on by the defend-

ant company and which may be controlled and regulated by congress alone.

Brown v. Maryland, supra.

Hayes v. Pac. Mail, 17 How., 596.

Morgan v. Parham, 16 Wall., 471.

Commonwealth v. Standard Oil Co., 101 Penn. St., 119.

Wabash v. Ill., 118 U. S., 573.

Gloucester Ferry Co. v. Penn.;

Phila. & S. Steamship Co. v. Penn., supra.

"The corporate franchise, the property, the business, the income, of corporations created by a state may undoubtedly be taxed by the state; but in imposing such taxes care should be taken not to interfere with or hamper, *directly or by indirection*, interstate or foreign commerce or any other matter exclusively within the jurisdiction of the federal government. This is a principle so often announced by the courts, and especially by this court, that it may be received as an axiom of our constitutional jurisprudence." (Italics are ours.) *Philadelphia & S. Steamship Co. v. Penn., supra.*

It may be and probably will be claimed that our contention in this particular is settled by *Pullman v. Adams, 189 U. S., 420*, where the court says:

"The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce."

The tax in that case, however, was not assessed against capital stock or instrumentalities of interstate commerce not located or entering into the business done within the state of Mississippi, but was confined to the cars run in the state; a flat license tax of "One hundred dollars and twenty-five cents

per mile for each mile of railroad track over which the company runs its cars." The court *assumed* that the last words meant the *cars run in the state*.

That the payment required by the Kansas statute is a tax, is elsewhere discussed. But in connection with the proposition here contended for we refer to the distinction between a fixed license or privilege charge for the doing of a particular act, which is recognized as a license fee, and the imposition of a tax based upon property or capital stock and computed at a fixed rate, for revenue. The latter is held to be a tax.

In *Gulf & Ship Island Railroad v. Howes*, 183 U. S., 66, the court says (opinion, p. 77):

"Whatever may have been the fluctuations of opinion upon this subject, and it is not to be denied that there are many cases in the state courts holding that a privilege tax is not a tax upon property, the law in this court, so far as concerns railway franchises, must be deemed to have been settled by the case of *Wilmington Railroad v. Reid*, 13 Wall., 264."

And on page 78:

"It follows, then, that privilege taxes being taxes upon property are subject to the constitutional limitations of 1869 and their exemption was equally repealable as that of *ad valorem taxes*."

Mr. Cooley, in his work on Taxation, third edition, 1126, thus defines the distinction which he says is not so much one of form as of substance. "The proceedings may be the same in the two cases, though the purpose is essentially different. The one is made for regulation and the other for revenue."

But the nature of the charge imposed is not material. In *Ashley v. Ryan*, *supra*, it is said (opinion, p. 440):

“Whether this charge be viewed as a tax, a license or a fee, if its exaction violated the interstate commerce clause of the constitution of the United States, or involved the assertion of the right of a state to exercise its powers of taxation beyond its geographical limits, it was void, whatever might be the technical character affixed to the exaction.”

The Kansas statute requires payment of the tax (which is defined as a “charter fee”) by a foreign corporation, *before* filing a copy of its charter, and this action is brought upon the theory and claim that until the company pays the tax it can acquire and have no right to do business in the state; that payment of the tax is a condition precedent to the right to do business, and the State Supreme Court so held.

A statute requiring payment of a fixed license fee as a condition precedent to doing business in a state, when applied to a corporation doing business, both state and interstate, is held to be a condition precedent to the doing of business within the state only.

Osborne v. Florida, 164 U. S., 650.

That construction by the state court was necessary to sustain the statute under the rule of *Crutcher v. Kentucky*.

The Kansas statute has been given the same construction by the Kansas court, and for the same reason, and also for the same reason it should be construed as requiring a levy of the tax only upon the capital stock “employed in this state.” Such a

construction would accord with *Pullman v. Adams*, *supra*.

The Kansas law and the Mississippi law (construed in *Pullman v. Adams*) have two features in common; both provide for privilege taxes; under the Kansas statute the tax is assessed by a fixed rate on the capital stock *without limiting it to the capital stock employed in the state*, under the Mississippi statute, by a fixed rate on the miles of railroad track over which the cars run, *without limiting it to the cars run or employed in the state*. The analogy in that particular is perfect, but in *Pullman v. Adams*, the court, by construction, limited the application of the Mississippi statute to the miles of track over which the cars run "*in the state*."

It is true that the words "*in the state*" were afterwards added to the statute by an amendment, but they were not in the statute when the tax which was before the court was assessed.

Such a construction of the Kansas statute would also be in accord with many other decisions of this court and of other courts on the subject of state interference with interstate commerce by taxation, and of attempts to tax property beyond the jurisdiction of the state. See

Commonwealth v. Standard Oil Co.;
The People of Colorado v. Pullman Co.;
Ashley v. Ryan, *supra*.

It would be equitable and would not deprive the state of any revenue to which it is entitled in fairness and good conscience. The Supreme Court of Kansas, in its decision in this case, lays emphasis

on the fact that a domestic corporation of that state must pay the tax on its entire capital stock before it can obtain a charter, although it may intend to employ portions or all of its capital elsewhere, but the state in such case is granting to the corporation its entire corporate franchise—all that gives it corporate entity or value—the right to be and to employ its capital stock at all—while in case of a foreign corporation entering the state, the most the state can grant is the privilege of employing such of its capital stock there as it may bring in. Fairness would require that it be not taxed upon what it does not enjoy and employ in the state, and for which it receives no protection from the state.

Union Transit Co. v. Kentucky, 199 U. S., 194.

Such a construction would follow the rule stated by Mr. Chief Justice Fuller in the opening paragraph of the opinion in *Postal Telegraph v. Adams*, *supra*, 155 U. S., 688, a portion of which, from page 696, is as follows:

“Property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property *within the state*, and may take the form of a tax for the *privilege of exercising its franchises within the state*, if the ascertainment of the amount is made dependent in fact on the value of its property situated *within the state* (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon) and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the

collection of taxes. The corporation is thus made to bear its proper proportion of the burdens of the government under whose *protection* it conducts its operations, while interstate commerce is not in itself subjected to restraint or impediment." (Italics are ours.)

While no case has been decided by this court involving a tax imposed by a state upon the capital stock or property of a foreign corporation employed in interstate commerce as a condition to the carrying on of interstate business (except to the extent that such capital stock or property is employed in the state) the court held in *Norfolk Railroad v. Penn*, 136 U. S., 114-120, that a tax assessed for keeping an office in the state was a tax upon the means or instrumentalities of the Railroad Company's interstate commerce, in violation of the commerce clause of the constitution, and it is respectfully urged and submitted that that holding is decisive against the power of the State of Kansas to tax in any form, or under any guise, the instrumentalities of interstate commerce owned by this plaintiff in error, beyond such of those instrumentalities as may be within the jurisdiction of the state, having either an actual *situs* there or the average thereof passing through, as in *Pullman v. Pennsylvania*, *supra*.

THE CONSTRUCTION PLACED UPON SAID ACT OF THE LEGISLATURE BY THE DECISION OF THE SUPREME COURT OF KANSAS RENDERS SAID ACT UNCONSTITUTIONAL AND VOID, BECAUSE, AS SO CONSTRUED, IT IMPAIRS THE OBLIGATION OF CONTRACTS. IT DEPRIVES THE DEFENDANT OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW, AND DENIES TO THE DEFENDANT THE EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE IMPAIRMENT CLAUSE AND OF THE FOURTEENTH AMENDMENT AND OF THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES AND OF THE ACTS OF CONGRESS PASSED IN PURSUANCE THEREOF.

We contend also that the State, through years of acquiescence in the company's doing business in Kansas and in recognizing the company as lawfully doing business in the state for years, is estopped from now denying its right to exercise its franchise except upon a condition precedent to payment of a tax upon its entire capital stock. For many years the Pullman Company, by the laws of Kansas, has been placed under the control of its Board of Railroad Commissioners. We quote from the Railroad Commissioners' Act:

"Said Commissioners shall have general supervision of all railroads operated by steam within the state, and all express companies, sleeping car companies, and all other persons, companies, or corporations doing business as common carriers in this state. * * *

It is admitted by the record that by laws passed relating to private corporations, and especially by laws having reference to sleeping car companies, The Pullman Company was induced and invited to

engage in the sleeping car business into and through the State of Kansas and to furnish to the citizens of the State of Kansas sleeping car accommodations co-extensive with railroad facilities upon all trunk lines entering into or traversing the State of Kansas; and that upon the faith of such invitation and before the statute under which the right is now claimed to exact the charter fee was enacted, various contracts were made involving the expenditure of many thousands of dollars to furnish sleeping car accommodations into and through the State of Kansas upon the railroad lines therein; that all of such money was expended in the full faith and confidence in the laws already enacted by the State of Kansas for the furtherance and encouragement of such business, and also in the full faith that the company would have the equal protection of the laws of the State of Kansas, and a fair and equitable and equal treatment in the matter of taxes and other public charges imposed upon it.

It is further conceded that only sleeping car business is transacted in Kansas by The Pullman Company; that such cars are furnished to the railroad companies under contracts whereby they are leased to be used by the railroad companies in the transportation of first-class passengers. As a part of the contract the company furnishes attendants in the form of conductors and porters to facilitate the giving of sleeping car accommodations to first-class passengers whose right to enter and travel upon the railroad is primarily and absolutely based upon their producing and holding first-class railroad tickets, and for compensation and rental of such cars

to the railroad companies the company has and reserves the right to collect extra fees for the furnishing of such accommodations.

It is further admitted that the Pullman cars so furnished are under the absolute control, dominion and disposition of the railroads and under the several contracts with the railroad companies are made to constitute a part of the through, first-class passenger trains of such railroad companies; that no one not contracting with the railroads for transportation and holding first-class ticket is entitled to receive such sleeping car facilities; that under the laws of the State of Kansas the railroad must furnish all facilities to all passengers applying, without favor or discrimination.

Therefore, it appears that as the cars are in the keeping and control of the railroad companies and the railroad companies have supervision over them in all of their departments except the incidental one of receiving compensation, the railroads are bound by law to furnish to all applying passengers such sleeping car facilities in the order of their application, without discrimination, for or against any class of passengers, whether holding interstate or intra-state transportation. Unless the railroads, therefore, are absolved, they may exact under the laws of Kansas by reason of their dominion over the cars, the furnishing of such transportation to intra-state passengers from The Pullman Company.

It is also conceded that The Pullman Company entered into contracts with these railroad companies for the furnishing of these cars whereby it was bound to furnish sleeping car facilities to all pas-

sengers holding first-class transportation, without favor or discrimination.

That these contracts were made under and in compliance with the laws of the State of Kansas, which forbid railroad companies to discriminate in that respect.

It is our contention that the construction placed upon the act by the Supreme Court of Kansas abrogates and annuls the covenants of these contracts which were lawful when made, which still exist and have most, if not all of them, many years to run, in violation of the Federal Constitution in the respect of the impairment of the obligation of such contracts.

Inasmuch as The Pullman Company may not discriminate under the law and as the railroads may enforce the due performance, the cars being under their dominion and forming a part of their passenger trains, The Pullman Company cannot comply with the judgment of the Supreme Court of the state without its withdrawing its cars entirely from operation and thus abrogating the contracts as a whole. In Chapter 84 of the Statutes of Kansas of 1905, the law with reference to railroads is declared to be as follows:

"It shall be unlawful for any railroad company or other common carrier to grant any special privileges to any person, firm or corporation, either in the way of preferences in furnishing cars, side track facilities, sites for elevators, mills or warehouses, *or any other form of preference, privilege or discrimination.*"

The sweeping inclusion of the last clause of this statute would be plainly violated if the law gave to

a citizen of Kansas who applied for sleeping car privileges, being a first-class passenger and holding railroad transportation, the right to obtain these privileges and to ride in the sleeping car upon payment of the seat charges, from some point in Kansas to some point outside of the state and deny the same to a passenger who applied in the same way, who rode only or desired to ride to a point within the state.

It therefore is to be considered whether the judgment of ouster as rendered by the Supreme Court of Kansas is violative of that provision of the Federal Constitution which forbids the impairment of contracts.

It needs no citation of authorities to support the proposition that there is no difference in principle between an act of the legislature of a state and a judgment by one of its courts which may result in such impairment. They are equally obnoxious to the constitutional prohibition.

It is admitted that the contracts with the railroad companies were lawful contracts when they were made and that they are still in existence. Further, that the contracts were in existence before the passage of the Bush Corporation Act. Can they be impaired by any statute of the State of Kansas or by any proceeding under any statute of the State of Kansas?

It may be contended that the contract is not wholly abrogated, as above suggested, but would exist as to all but the business done wholly in the state, which it will be asserted is in the state's jurisdiction. That is apart from the question. The word "impairing"

as used in the Constitution has been frequently interpreted. We ask the court's careful consideration of the following cases:

"The word 'impairing' in the Federal Constitution or prohibiting any law impairing the obligation of contracts does not mean destruction. Consequently, every state law which weakens the obligations or renders them less operative, is a violation of the provision against impairment."

Lapsley v. Brahsars, 14 Ky. (4 Litt.), 47, 53.

"Whatever enactment abrogates or lessens the means of enforcement of a contract impairs its obligation."

State v. Jumell, 107 U. S., 711.

The leading case upon this subject is the celebrated case of *Green et al. v. Biddle* (8 Wheat., 1), involving the compact between Virginia and Kentucky, whereby and by the terms of subsequent legislation of the State of Kentucky the contract rights of certain parties, particularly as to remedy, as they existed before the compact, were modified and changed. The case was twice argued. Judge Story, who delivered the opinion upon the first argument, said (p. 351):

"It is no answer that the acts of Kentucky now in question are regulations of the remedy, and not of the right to lands. If those acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overthrown his rights and interests."

Upon application of Henry Clay the court granted a rehearing and the case was reargued by very dis-

tinguished counsel. Justice Washington, who delivered the opinion of the court upon the second hearing, used the following language:

"The objection to a law, on the ground of its impairing the obligations of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation. Upon this principle it is that if a creditor agree with his debtor to postpone the day of payment, or in any other way to change the terms of the contract, without the consent of the surety, the latter is discharged, although the change was for his advantage."

Another leading case is that of *Van Hoffman v. City of Quincy*, 4 Wall., 535, which forbids a state, which has authorized a municipal corporation to issue bonds, and to exercise the power of taxation for the redemption of the same, from modifying or withdrawing the power to tax until the contract is satisfied. It reviewed all the decisions of the Supreme Court under the head of Article I, Section 10, of the Constitution of the United States (to the effect that no state "shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts"), from *Fletcher v. Peck*, 6 Cranch., 87, to the time of the decision.

"The case of *Fletcher v. Peck*," said Justice Swayne, delivering the opinion, "was the first one in this court in which this important provision came under consideration. It was held

that it applied to all contracts executed and executory 'whoever may be parties to them.'
 * * * This case was followed by those of *New Jersey v. Wilson*, 7 Cranch., 164, and *Tetterton v. Taylor*, 9 Cranch., 43. The principles which they maintain are now axiomatic in American jurisprudence and are no longer open to controversy."

We have already pointed out that the law not only authorized but directed the contracts which we made with the railroad company, and that such laws became a part of the contract, namely, that we were to furnish passengers of the several railroad companies, and all the passengers of such companies, sleeping car facilities without discrimination or difference. Upon this point the court says, in the case of *Van Hoffman v. Quincy*:

"It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement. Illustrations of this proposition are found in the obligation of the debtor to pay interest after the maturity of the debt, where the contract is silent; in the liability of the drawer of a protested bill to pay exchange and damages, and in the right of the drawer and endorser to require proof of demand and notice. These are as much incidents and conditions of the contract as if they rested upon the basis of a distinct agreement."

We made our contracts with the railroad companies in the light of the railroad companies' duties, under the law, to the public. The law was positive and peremptory. We contracted obedience to the

law in the covenants that we made. There can be no argument that the obligation of the railroad companies in this behalf has been impliedly repealed by the act which created the charter board, and under which the court assumes to declare a forfeiture of our right to do domestic business and to enforce the same by this action. The law is still there. The contract is therefore still lawful and it is so admitted to be by the demurrer. The legislature could not change it, and certainly it cannot be changed by any declaration or decision of the charter board. Neither can it be affected practically by any judgment of the court. The court, in conclusion, says:

"It is competent for the states to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced the act is within the prohibition of the constitution, and to that extent is void."

See, also:

Bronson v. Kinzie, 1 How., 311;

McCracken v. Hayward, 2 How., 608;

Barton v. Van Ripper, 16 N. J. Law (1 Harr.), 7, 11;

Woodruff v. State, 3 Ark. (3 Pike), 285;

Bank v. State, 12 Miss., 439.

It is pleaded in our answer that we were in Kan-

sas by invitation and consent of the state long prior to the passage of the Bush Corporation Act; that the state recognized us and assumed control and supervision over us; that they subjected our property to taxation and that we paid such taxes and that we had been in the continuous transaction of our business for many years with the consent of the State of Kansas.

What we are contending for now is that having come into the state and become, as it were, a denizen of the state upon the state's invitation and permission, and performing all our duties and obligations for many years, it cannot now exclude us from the doing of all or of any part of our business upon the assumption or theory that since the passage of the Bush Corporation Act we are not within the state, are not a denizen of the state, but for the first time are applying for admission to do business in the state. This is not only false in fact, but ridiculous in theory, and we say that the state has no power for any reason to exclude us from doing a business which we have engaged by solemn contract to do for the railroads of Kansas, made upon the faith of and in obedience to the laws of Kansas, and while we were in the State of Kansas with the authority and permission of the state and its laws. This principle is well decided in the case of *Edward v. Kearzey*, 96 U. S., 595. This is the first of the stay law cases, one of which, as the court knows without citation, went up from this state. The court says:

"The point decided in *Dartmouth College v. Woodward* (4 Wheat., 518) had not, it is believed, when the constitution was adopted, occurred to any one. There is no trace of it in

the Federalist, nor in any other contemporaneous publication. It was first made and judicially decided under the constitution in that case. Its novelty was admitted by Mr. Chief Justice Marshall, but it was met and conclusively answered in his opinion.

"We think the views we have expressed carry out the intent of contracts and the intent of the constitution. The obligation of the former is placed under the safeguard of the latter. No state can invade it; and Congress is incompetent to authorize such invasion. Its position is impregnable, and will be so while the organic law of the nation remains as it is. The trust touching the subject with which this court is charged is one of magnitude and delicacy. We must always be careful to see that there is neither nonfeasance or misfeasance on our part."

The Supreme Court of Kansas declares by its decision that there has been a statute passed which requires The Pullman Company to appear before the charter board and pay this charter fee or submit to exclusion from the doing of inter-state or domestic business and thereby to abrogate contracts made with reference to and in obedience to the law as it existed before the passage of the act. Can this be done? We think the answer is to be found in the case of *Bedford v. Western Building Association*, 181 U. S., 227, which in fact and principle presents a perfect analogy to the case at bar. If this subsequent law is paramount and binding upon us, if we may be excluded from doing business in the State of Kansas for non-enforcement of its requirements, then the only answer to our contention here is that we are thereby absolved from fulfilling our contract to the railroad companies, several of which are incorporated under the laws of the State of Kansas

and are citizens of this State. It was not in contemplation when we made these contracts that we were not in the State of Kansas and rightfully engaged in business in the State, part of which business and the most important part of which was the entering into the obligations of these contracts. Neither was it in contemplation that the Legislature of Kansas might assume that we were not in the State at all, but that we should have to apply for admission to do business in the State and pay a fee graduated upon our entire capital to accomplish such admission. Neither was it contemplated that if we refused to pay that fee the State would abrogate these contracts and exclude us from the performance of the same. Can the State do this? Again, we say the answer is to be found in the case of *Bedford v. Western Building and Loan Association*, *ubi supra*, which case we commend to the careful consideration of the court. For the convenience of the court we quote the court's argument which, as we contend, is a perfect analogy to the case here. We premise, however, by saying that a corporation had been admitted to the State of Tennessee to do business as a loan association and had made certain contracts whereby it agreed to make loans upon certain securities. Meanwhile, the State of Tennessee, in pursuit of revenue, passed a statute similar to the Bush Corporation Act, requiring the re-entrance of the corporation upon terms as extravagant as in this case. We quote from the opinion of the court (p. 240):

“The statutes of Tennessee relied on as a defense were passed March 26, 1891, and to repeat, the question is, did the subscription to the stock of the association, its issuance and the

application for a loan in pursuance of it, constitute a contract which was inviolable by the State Legislature? We think the answer should be in the affirmative. By his subscription to stock of the association Bedford became a member of the association—bound to the performance of what its by-laws and charter required of him, and entitled to exact the performance of what the by-laws and charter required of the association. Each acquired a right to what the other promised, and there were all the elements of a contract. We are compelled, therefore, to disagree with the views expressed by the Supreme Court of Tennessee, in *New York, &c., Building & Loan Association v. Cannon*, 99 Tennessee, 344, notwithstanding our high respect for that learned tribunal. It was there contended that 'Cannon, having become a stockholder in the association before the acts were passed, with a view to becoming a borrower, and for that purpose, and having made his application for a loan likewise before the acts passed, acquired a vested right to the consummation of the loan, and the association became legally obligated to complete it, and it was also unfinished business, which the association had a right, and which was its duty, to finish, notwithstanding the acts of the legislature.' To this contention the court replied: 'If we were to grant that the borrower had a vested right to the loan, and the association had a legal obligation to consummate it, still, it must follow that the contract could be entered into, and the loan and mortgage made, only in compliance with the law. There was nothing to prevent the association from complying with the statutes and thus placing itself in the attitude where it could legally make the loan and take the mortgage if it were under obligation to do so, as it claims.'

And the court observed that it could not be considered that the association and Cannon were

winding up an old transaction and unfinished business, but were doing business in the sense of the statute and in defiance of its prohibition, and refused to enforce the mortgage of the association. We cannot assent to the view that there is nothing to prevent the association from complying with the statutes. The mere filing of its charter in a particular office—the secretary of state's or some other office—might be easily complied with, but the deposit with some responsible trust company or state officer of the state or some other state, of mortgages or securities of from \$25,000 to \$50,000 in amount, at the discretion of the state treasurer, might be impossible to comply with. At any rate, the requirement is so very onerous that the association could justly decline to do business in the state on that condition. It might indeed have the right to decline any condition and retire from the state, and from all it had the option to retire from. But it could not retire from the execution of its contracts. It contracted with Bedford to make him a loan if it had the means in its treasury and his security was good. The state could not affect that obligation nor impair it. 'The obligation of a contract "is the law which binds the parties to perform their agreement."' 4 Wall., 452. The building association was incorporated under the laws of New York to make loans to its members, and rights to a loan accrued to membership. The condition of a loan existing—means in the treasury, a tender of good security—the contingent right became a vested one, a contract was formed, and, can there be a doubt that it was enforceable against the association? If it could have been enforced by suit, it was properly yielded to without suit, and possessed all legal sanction.

We recognize the power of the state to impose conditions upon foreign corporations doing business in the state. We have affirmed the

existence of that power many times, but manifestly it cannot be exercised to discharge the citizens of the state from their contract obligations."

The only difference between the foregoing case and ours is that we are standing upon our rights as we believe them to exist and refusing to pay this exaction. We have not withdrawn from the state because we cannot withdraw from it under the obligations of our contracts and no law can be passed changing our conditions, since we made those contracts, in such a way as to impose a burden of \$14,800 upon us—an unlawful burden as we contend, or in the alternative to exclude us from doing part of our business in the state and thereby abrogating and annulling such contracts.

See also *Security Savings and Loan Association v. Elbert*, 153 Ind., 98, reported in 54 N. E., 753, where the court says:

"The act must, if possible, be read as not impairing the obligation of contracts, to be constitutional. * * * If a contract is valid when executed, which contemplates the lapse of several years before all its terms are carried out, it must be held to remain valid and enforceable to the end under the laws in force at the time of its execution, no matter what changes the law has undergone in the lifetime of the contract."

This also was a statute changing the conditions under which foreign corporations might do business in Indiana.

On the faith of its license and permission from the State of Kansas and by the acquiescence of the State, The Pullman Company entered the State for

the operation of its sleeping cars and expended large sums of money in equipping its cars and in carrying out the contracts made with the various railroad companies operating lines of road within the State of Kansas. The company is not now seeking for the first time to enter the State, but asks only the right to remain therein upon equal terms with other persons and corporations. If the license of a state can be revoked at pleasure and at the caprice of succeeding legislatures, then the payment of a lump sum as a consideration for the privilege of entering a particular state can therefore be transmuted to a periodical tribute for remaining therein on pain of losing whatever the company may have invested on the faith of the right to enter.

It is our contention that no state can invite a foreign corporation to come into its territory and engage in business and upon certain terms, all of which the company has complied with for years and paid taxes, made reports, and submitted itself to the jurisdiction of the state, and then, after the foreign corporation has complied on its part with all of such terms, by subsequent legislation impose more onerous terms or oust the company from transacting business within its borders.

This proposition has received the attention of various courts within recent years. It would seem to be the generally accepted rule that where invitations are extended or proposals made by a state's laws, the state may abandon or deprive itself of the right to expel the corporation upon its having complied with the offer. The fact that the proposition is accepted and outlays are made thereunder, giving

to the company vested rights to do a lawful business within the state and the state on the other hand having induced the company to make these outlays and enter into such business, is estopped from depriving such company from the exercise of such right.

Seaboard Air Line Railway v. Railroad Commissioners, 155 Fed., 792.

Railway Co. v. Ludwig, 156 Fed., 152.

A right, therefore, in contract is created. This right manifestly, as well as other rights in contract, is protected by the Constitution of the United States.

The state cannot impair its obligation, nor can it ruthlessly take in any manner from the other contracting party, the operating company, the rights created under the contract.

When The Pullman Company expended its money in providing equipment for the carrying out of its contracts made with railroads operating lines within the State of Kansas and entered upon the carrying out of such contracts and in operating sleeping cars within the limits of the State of Kansas, it was given to understand by the permission of the State and the Constitution of the State and of the United States that only reasonable regulations and taxes would be imposed upon it in the transaction of either inter-state or domestic business in Kansas. That the invitation, fully pleaded in its answer in this case, could be lightly disregarded, that a tax graduated upon its entire capital and one that places it in the alternative of breaching all its contracts made with the various railroads or subject itself on the

other hand to punishment for contempt in not obeying the decision of the Supreme Court of the state in regard to its rights was not contemplated, is evident.

The enforcement of the judgment of the Supreme Court of Kansas would therefore clearly deprive The Pullman Company of its property contrary to the provisions of the Fourteenth Amendment, and the enforcement of such decision is the taking of the property of the company without due process of law and a denial to the company of the equal protection of the laws to which it is entitled under the terms of the Constitution of the United States.

It is our contention also that by The Pullman Company complying with the laws of the State of Kansas, which it entered years ago for the purpose of carrying on its business, a contract between the state and the company was created, and the right of the company to remain there is not merely a license revocable at the will of each succeeding legislature. This court has held in the case of *American Smelting Co. v. Colorado*, 204 U. S., 103, that a right to do business in the state without being subject to any greater liabilities than those placed upon domestic corporations was acquired by a foreign corporation upon its admission into the State of Colorado under the laws then of force which subjected foreign corporations to the liabilities, restrictions and duties imposed upon domestic corporations of like character and that such right was impaired by an act of that state subsequently enacted which required such corporations to pay an annual license fee in double the amount of that im-

posed upon domestic corporations. This court in passing upon that case uses the following language:

"A provision in a statute of this nature subjecting a foreign corporation to all the liabilities, etc., of a domestic one of like character must mean that it shall not be subjected to any greater liabilities than are imposed upon such domestic corporation. The power to impose different liabilities was with the state at the outset. It could make them greater or less than in case of domestic corporation, or it could make them the same. Having the general power to do as it pleased, when it enacted that the foreign corporation upon coming into the state should be subjected to all the liabilities of a domestic corporation, it amounted to the same thing as if the statute has said the foreign corporations should be subjected to the same liabilities. In other words, the liabilities, restrictions and duties imposed upon domestic corporations constitute the measure and limit of the liabilities, restrictions and duties which might thereafter be imposed upon the corporation thus admitted to do business in the state. It was not a mere license to come into the state and do business therein upon payment of a sum named, liable to be revoked or the sum increased at the pleasure of the state, without further limitation. It was a clear contract that the liabilities, etc., should be the same as the domestic corporation, and the same treatment in that regard should be measured out to both. If it were desired to increase the liabilities of the foreign, it could only be done by increasing those of the domestic corporation at the same time and to the same extent.

* * * * *

This is not an exemption from taxation, it is simply a limitation of the power to tax beyond the rate of taxation imposed upon a domestic corporation. Instead of such a limitation the

act of 1902, already referred to, imposes a tax or fee upon or exacts from the foreign corporation double the amount which is imposed upon or exacted from the domestic one. The latter is granted the right to continue to do business upon the annual payment of two cents upon each one thousand dollars of its capital stock, while the former must pay four cents for the same right. This cannot be done while the right to remain exists. It is a violation of the obligation of an existing, valid contract. *Home of the Friendless v. Rouse*, 8 Wall., 430.

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It is unnecessary to refer to the many cases cited by both parties hereto. Some of them refer to the question as to the nature of such a tax, while others decide, upon the facts appearing in them, whether there was a contract or not. As already stated, the name of the tax or its kind is not important so long as it is plain that the act of 1902 increases the liabilities of the foreign corporation over those which obtain in the case of the domestic. And in regard to the cases of contract, while the principle that a contract may arise from a legislative enactment has been reiterated times without number, it must always rest for its support in the particular case upon the construction to be given the act, and in this case we are not greatly aided by the former cases regarding taxation and legislative contract. We may, however, refer to the following out of many cases, regarding contracts as to taxation: *Miller v. The State*, 15 Wall., 478; *New York, Lake Erie & Western Railroad Co. v. Pennsylvania*, 153 U. S., 628; *Power, Auditor, v. Detroit, &c., Railway Co.*, 201 U. S., 543."

We therefore in conclusion beg to suggest that the license tax sought to be coerced by these proceedings is not in lieu of any kind or manner of tax due from the company upon its property, but is in addition

to all of them. The amount of the tax does not measure the cost of inspection or protection. These are covered by other taxes which are paid and collected out of the property of the company located in Kansas. It is purely and simply a tax for the privilege of doing business and implies the right to exclude, because it is measured by no justifiable standard and is wholly arbitrary. If the tax is valid, then a tax ten times as great would be equally valid; and if valid in Kansas, a like tax would become valid in every state in the Union through which the company operates. But we assert that a proper construction of the Kansas Act has not attempted the imposition of such a tax, and that the interpretation given by the Supreme Court of the state is against every known canon of statutory construction and such interpretation renders the act invalid and unconstitutional, for that:

(1) It denies to The Pullman Company the equal protection of the law.

(2) It takes the property of the company without due compensation or due process of law.

(3) It impairs the obligations of existing contracts.

Respectfully submitted,

CHARLES BEARD SMITH,

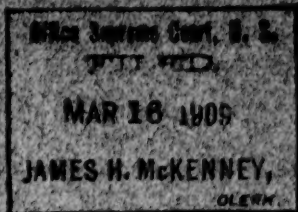
Attorney for Plaintiff in Error.

FRANCIS B. DANIELS,

GUSTAVUS S. FERNALD,

Of Counsel.





IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 125. 5

THE PULLMAN COMPANY, PLAINTIFF IN ERROR,

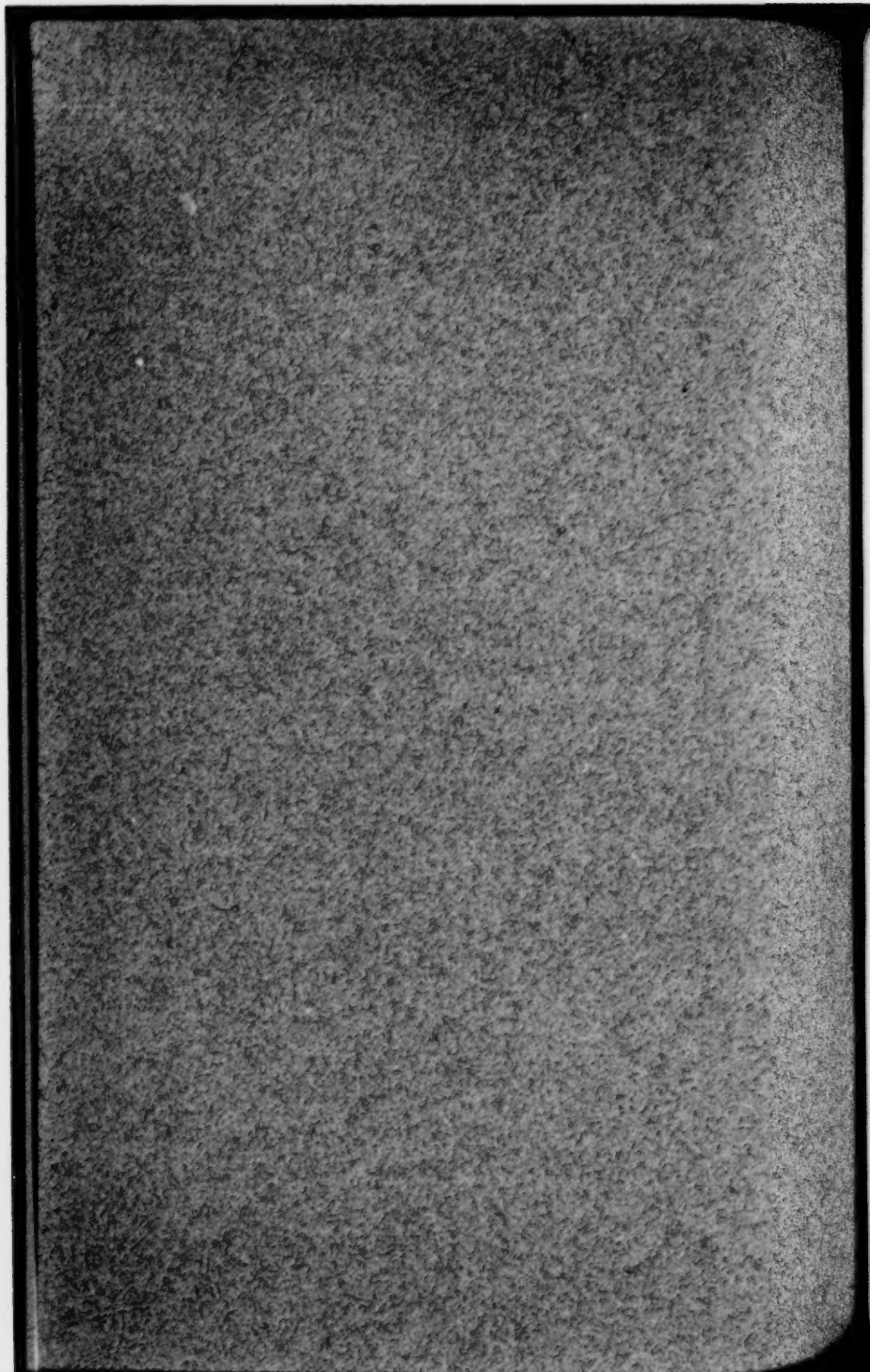
VS.

**THE STATE OF KANSAS EX REL C. C. COLEMAN,
ATTORNEY GENERAL, DEFENDANT IN ERROR.**

**ON WRIT OF ERROR TO SUPREME COURT OF STATE OF
KANSAS.**

BRIEF IN REPLY FOR PLAINTIFF IN ERROR.

**CHARLES BLOOD SMITH,
FRANK B. KELLOGG,**
Attorneys and of Counsel for Plaintiff in Error.



IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 125.

THE PULLMAN COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS EX REL. C. C. COLEMAN,
ATTORNEY GENERAL, DEFENDANT IN ERROR.

ON WRIT OF ERROR TO SUPREME COURT OF STATE OF
KANSAS.

BRIEF IN REPLY FOR PLAINTIFF IN ERROR.

(1) Let us first determine what taxes the State may impose against a foreign corporation engaged in interstate commerce. The property and capital of all such corporations used in a State for the purpose of doing interstate commerce may be taxed locally. This tax may take the form of a tax upon the property having an actual situs in the State or upon a proportion of the capital stock fairly intended to represent its property and business in the State; but it cannot go beyond a fair representation or equivalent of the property engaged in the State in interstate commerce. This court (Chief Justice Fuller writing the opinion) has clearly stated the limitations upon such system of taxation in the

case of *Postal Telegraph Cable Company vs. Adams*, 155 U. S., page 696. The court there said:

"But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. The corporation is thus made to bear its proper proportion of the burdens of the government under whose protection it conducts its operations, while interstate commerce is not in itself subjected to restraint or impediment."

There are many cases similar to this which need no discussion. Within this definition the tax upon all the capital stock of the Pullman Company cannot be sustained. There is no pretense that it was intended to fairly represent a proportion of the property or capital engaged in the State in interstate commerce, for such property is taxed in the usual manner for taxing property of all persons and corporations in Kansas. Within any rule for the apportionment of a tax to fairly represent the capital or property of a foreign corporation engaged in interstate commerce this statute would be void. It is not, nor was it intended to be, either a tax upon the property in the State or a franchise tax in lieu of such property, or a capital tax intended to represent the proportion of property and business local to the State, because, as we have said, all of this property and business was already taxed, and there was no possible way of dividing

this tax so as to reach only that portion of the capital stock representative of its business and property situated in Kansas. This much seems clear, and we do not understand that the State makes any claim to the contrary.

(2) Let us next consider those cases which hold that the States have absolute power to exclude foreign corporations not engaged in interstate commerce, or to fix the terms and conditions under which such corporations may be admitted. No one questions the proposition that corporations not engaged in interstate commerce have no rights beyond the States in which they are created, and that the States may impose conditions arbitrary, or otherwise, upon their admission into the State and their right to transact any business therein. Such cases are *The Bank of Augusta vs. Earle*, 13 Pet., 519; *Paul vs. Virginia*, 8 Wall., 168; *Horn Silver Mining Company vs. New York*, 113 U. S., 314-15. *The foregoing rule, however, does not apply to corporations engaged in interstate commerce or those intending to so engage. The rule is also limited to the admission of such corporations into the State, when the corporation is once admitted and acquires property therein, although not under an irreparable contract to remain, yet the State cannot thereafter impose an unconstitutional tax as a condition of the continuance of such corporation in the State.*

(3) The State cannot prevent a corporation engaged in interstate commerce from continuing such business, nor can the State define the terms and conditions on which such interstate commerce shall be transacted, nor impose any burdens thereon beyond the burden of taxing the capital and property of the company fairly employed in the State for the purpose of bearing its fair proportion of the burdens of government. Keeping this fundamental proposition in view, it can make no difference what form the tax or

burden takes. The court will look through the matter of form and will determine for itself whether the statute does impose a burden upon interstate commerce (*Galveston, Harrisburg, &c., Railway Company vs. Texas*, 210 U. S., 227). In this case the court said:

"Neither the State courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon the commerce among the States so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form."

The question is one rather of applying the facts of this case to the principles thus established. The Pullman Company was for many years before the passage of this act admitted into the State of Kansas, engaged in interstate commerce, furnishing the cars to the railroads for their use in transporting passengers into, out of, and through the State. It has contracts with the railroads to furnish cars for a certain compensation, and in addition thereto it charges a fee to the passengers for the accommodation in the cars thus used in interstate transportation. It is immaterial to the question we are discussing whether the Pullman Company has an irreparable contract with the State whereby it may continue business in the State or not. We will assume that it has not. Confessedly, the company was lawfully in the State, and had a clear right to arrange with the railroads by contract to engage in interstate as well as domestic commerce, and the business thus acquired was being done in a legal manner according to the laws of the State of Kansas. The company therefore being lawfully engaged in interstate commerce, the State passed a statute, general in terms, which required this company to pay a fee, charge, or tax upon all of its capital stock, more than 99 per cent of which is represented by property situated beyond

the State, and representing business not done in the State of Kansas, and the larger part of that which is represented by the business in Kansas representing interstate commerce. This fee must be paid before the corporation is permitted "to engage in business as a foreign corporation in the State." The language of the act is general, but the Supreme Court has construed the act to mean that this tax upon the entire capital stock must be paid as a condition to its doing a local business. In other words, unless the corporation consents to pay a tax upon its entire capital representing its local and interstate business, and its property situated in other States and engaged in interstate commerce in those States, as a penalty it will be excluded from doing a local business in the State. The question is, therefore, have the States power, as a condition of doing an *intrastate* business, to impose upon the corporation a tax upon *interstate* commerce, or upon property situated beyond the State over which the taxing power of the State does not exist? This is not even a question of originally admitting the corporation into the State, but the legislature imposes an unconstitutional tax as a condition of its continuing in the State as an agency of domestic commerce. That this might result in destroying a corporation, and compelling it to withdraw from interstate commerce, is admitted by the court below. The court said:

"The fact that other States may impose like conditions so that the defendant may be obliged to pay on forty-five times \$74,000,000 to obtain permission to do local business in all the States is irrelevant. The State of Kansas is not obliged to yield its right to impose conditions upon the local exercise of foreign franchises because other States have the same right."

The result of this is perfectly evident. The Pullman Company was legally admitted into this State; it acquired a property and business therein; it has entered into contracts with the railroads and is engaged in interstate com-

merce; it pays a tax to the State on a fair proportion of its capital and property engaged both in interstate and intrastate business; it is performing the interstate commerce with the same instrumentalities, the same cars as are used in the intrastate business; these cars are hauled on the same trains, accommodate local passengers with through passengers; and as a condition to its continuance to do a purely intrastate business it may, under the rule laid down by this Court, be required to pay a tax on its interstate business, or, to put it in another form, on all its capital stock engaged in all the States. In fact, it may be called on to pay a tax on its entire capital in each State before it can continue to do a local business.

It seems to us that this case comes within those decisions of this Court which hold that the States may not, as a condition of continuance to do a business in the State, impose a tax upon the entire capital. *Galveston, Harrisburg, &c., Railway Company vs. Texas*, 210 U. S., 219; *Gloucester Ferry Company vs. Pennsylvania*, 114 U. S., 209; *Philadelphia Steamship Company vs. Pennsylvania*, 122 U. S., 235; *Crutcher vs. Kentucky*, 141 U. S., 47. A careful consideration of the real principles underlying these cases will in our opinion demonstrate the invalidity of this tax.

In the case of *Galveston, Harrisburg, etc., Railway Company vs. Texas*, 210 U. S., 218, this court had under consideration a law which provided for the imposition upon railroads and corporations owning, operating, managing or controlling any line of railroad in the State for the transportation of passengers, freight or baggage, of a tax "equal to one per centum of its gross receipts if such line of railroad lies wholly within the State, and if such line of railroad lies partly within and partly without the State, it shall pay a tax equal to such proportion of the said one per centum of its gross receipts as the length of the portion of such line within the State bears to the whole length of such line." The court held that this was an invalid tax.

In the Gloucester Ferry case, 114 U. S., 209, and the case of Philadelphia Steamship Co. *vs.* Pennsylvania, 122 U. S., 235, the tax was upon the corporate stock. A tax upon the corporate stock of a corporation is a property tax. Gray, in his work on Limitations of Taxing Power, said:

"A specific tax on a foreign corporation measured by the amount of business done or by the amount of receipts or earnings or dividends is generally a tax on the privilege of doing business in the State. A tax on a domestic or foreign corporation which involves a valuation of property by reference to the amount of capital stock and an assessment upon such valuation is generally a property tax."

This same rule was laid down in the Gloucester Ferry case, *supra*:

"In giving its decision the court said that it had been repeatedly decided and was settled law that a tax upon the capital stock of a company is a tax upon its property and assets."

In all the long line of cases a tax upon the capital stock has always been held to be a tax upon the property. This tax is a tax upon all the capital. No possible construction can make it a tax on the business done in the State. First, such business and property has already been taxed, and second, it is in no way limited by the amount of that business. The amount of that business does not enter into the determination of the amount of the tax in any possible way. The business in the State might not be one-hundredth part of one per cent, yet the tax would be the same. It is a tax upon the property representing the interstate business as well as the intrastate business and the business in all other States and countries. The question is, where does the burden come? The burden is upon the corporate property. Suppose this statute had simply provided that upon the failure to pay this tax upon the entire corporate stock the company should be fined one thousand dollars or a

million dollars. Clearly, there would be no question that this was a tax upon all the property of the company as represented by its capital. Does it change the form of the tax because the penalty imposed is the exclusion of the corporation from doing a local business? The latter penalty may be more serious to the company than the imposition of a fine of one hundred thousand dollars. Let us elaborate this in another form. Suppose in the Texas case (210 U. S., 209) the legislature had levied a tax equal to one per cent upon the gross earnings derived from traffic, state and interstate, and as a condition to the payment of that tax the law had provided that unless the same was paid the railroad company should be excluded from doing business in the State, and the courts of the State had held that the statute meant that the railroad should be excluded from doing an intrastate business. Would the tax be less invalid because the legislature had provided a remedy of excluding the corporation and thus compelling it to pay the tax instead of the ordinary remedies for the collection of such a tax? The real nub of the case is, what is the tax, not what is the remedy. The court below has not held that the tax upon this capital stock was not a tax upon all the property and capital of the company, but simply that the only remedy is the exclusion of the company from doing an intrastate business. The question is, can a legislature of a State impose a tax on interstate commerce or on property situated beyond the State as a condition of a corporation continuing to do an intrastate business. In our judgment it cannot, for if such a tax can be sustained the result would be that all the railroad companies, telegraph companies, express companies and other carriers engaged in business in the States could be excluded from continuing to do an intrastate business because the company refused to pay an unlawful tax; for if Kansas may impose such a tax upon the entire capital, so may each of the States. It is not immaterial, as the court says, for this would permit the States to impose an unconstitutional burden upon interstate

commerce as a condition to the continuance of the corporation in the State, and might thereby compel all the interstate carriers to go out of intrastate business altogether. In fact, other States have passed similar acts in relation to this company. There is pending in the Supreme Court of Texas a case still more onerous, and a statute of Colorado exactly like the one in the case at bar was held invalid by Judge Riner in the Circuit Court of the United States for the District of Colorado. We append hereto a copy of the opinion (not reported). Similar legislation affecting telegraph companies has been enacted in Arkansas and the question of its validity is pending before this court.

We believe if these principles are kept clearly in view it is easy to distinguish this case from the case of *Osborne vs. Florida*, 161 U. S., 650; *Pullman Company vs. Adams*, 189 U. S., 420, and other similar cases. In the former case the statute of Florida required persons engaged as agents for managing various business professions, etc., to pay a certain fee for a license, and the local agents of express companies were also required to do the same. The courts of Florida construed this statute to be a license for a local agent doing the local business of the express company. It was in no sense a tax upon the capital of the company representing its business locally in the State and its foreign and interstate business, but was purely a license fee for the local agent acting as such in the State of Florida. Of course if the license fee had been made a condition to such local agent also representing the company in its interstate business, it would have come within the *Crutcher* case (111 U. S., 471), and within the general rule that no such burden could be imposed upon interstate commerce, but it did not purport on its face to be a tax on its capital, and being therefore confined to the local agents' license to engage in intrastate commerce, it was sustained. In *Pullman Company vs. Adams*, *supra*, the statute on its face provided for the imposition of a license or fee upon sleeping cars carrying passengers from

one point to another within the State and 25 cents per mile for each mile of railroad track over which the company run its cars in the State. It was clearly limited to a tax upon property within the State.

Take, for instance, the case where a statute imposes a tax upon the earnings from transportation. If the statute, as construed by the court, is limited to the imposition of a tax upon the local earnings, then, of course, it does not burden the interstate transportation (*Western Union Co. ex. Alabama*, 132 U. S., 472, and *Louisiana ex. Ry. Co.*, 133 U. S., 587). But in the case at bar the court did not hold that this tax was not a tax upon the entire property of the corporation, but that it was imposed upon the entire property as a condition to the continuance of the corporation doing an intrastate business, and the decisions of the courts are cited which hold that the corporation might withdraw from its intrastate business. That, however, does not any the less make it a burden upon the interstate commerce.

(4) But even conceding we are wrong about the foregoing proposition, it seems to us that this law, as construed by the Supreme Court of Kansas, burdens interstate commerce. The Pullman Company cannot refuse to do a local business in the State of Kansas and withdraw from the State.

It is alleged in the answer and admitted by the demurrer in this case that under the requirements of the statutes of Kansas the Pullman Company is required to receive and accommodate all passengers asking for sleeping-car service, and that it cannot omit or withdraw from the due performance of such public duty. The court, of course, takes judicial knowledge that the railroads in Kansas are common carriers and that they cannot discriminate between local and interstate passengers, and that they must furnish equal facilities for all passengers. These cars are run upon interstate trains and receive both interstate and intrastate passengers. It is not possible for the railroads nor the Pullman Company to

refuse to receive and transport, on reasonably equal terms, passengers traveling from point to point within the State. This court held in *Allen ex. Pullman Company*, 191 U. S., 183:

"The car was equally a vehicle of transit, as if it had been a car owned by the railroad company, and the special conveniences or comforts furnished to the passenger had been furnished by the railroad company itself."

See also *Pickard ex. Pullman Southern Car Company*, 117 U. S., 171.

The question is therefore whether the imposition of a tax upon the entire property as a condition of the company continuing to do a local business in the State does not cast a burden upon interstate commerce. True, it was held in *Pullman Company ex. Adams* that a privilege tax imposed by the State of Mississippi upon each car carrying passengers from one point in the State to another was a valid tax notwithstanding the fact that the company offered to show that its receipts from carrying the passengers named did not equal the expenses chargeable against such receipts. But this was a tax directly upon the local business of the company, and where a tax is levied on the property of the company within the State or directly on its business local to the State the only remedy the foreign corporation has is under the Fourteenth Amendment, guaranteeing to persons (corporations) the equal protection of the laws, so that the tax must be imposed on all alike. But if the tax is upon interstate commerce, then it is void for another reason, that it is a burden on interstate commerce, the control of which is exclusively placed in Congress, and an otherwise valid tax becomes invalid on that ground. The State must confine its taxing power to the property or the proportion of the property represented by the business in the State, or to the strictly domestic commerce.

Considering the subject of a license tax based on the business done within the State, or a direct tax on such local business, even that might be imposed under such a condition as to become a burden upon interstate commerce.

In the case of *Allen vs. Pullman Company*, *supra*, this court said, in reference to such a tax:

"If the payment of this tax was compulsory upon the company before it could do a carrying business within the State, and the burden of its payment, because of the minor character of the domestic traffic, rested mainly upon the receipts from interstate traffic, there would be much force in this objection."

Certainly, if the corporation is obliged by law to act as a common carrier, and treat all alike, even a tax upon its local business, the payment of which is made a condition of the continuance of the corporation to do business in the State, would be unconstitutional, because it would practically compel the corporation to withdraw from its interstate business, and, within the decisions of this court, that would clearly be a burden upon interstate commerce (*Louisville & Nashville Railroad Company vs. Eubank*, 184 U. S., 27). In that case this court held the long-and-short-haul clause of the constitution of Kentucky, as construed by that court, to be a burden upon interstate commerce, and void. The court of Kentucky construed that clause to prohibit a railroad company from making a greater rate for a shorter distance than for a long distance over the same line, the longer distance, however, being between points one of which was without the State and the other within. The court said:

"If the State of Kentucky has the right to base its provision for the rate of a short haul within its own borders by comparison with the rate for a longer haul partly within and partly without its own borders, notwithstanding the direct effect of a limitation arrived at by such comparison may be the regulation or even the suppression of the interstate com-

merce of the carrier, then this provision is valid; otherwise, it would seem to be the reverse.

* * * * *

"The result of the construction of this provision by the court below is in effect to prohibit the carrier from making a less charge for the transportation from Nashville to Louisville than from Franklin to Louisville, or else to make a charge that will prevent its doing any business between the States in the carrying of tobacco. The necessary result of the provision under the circumstances set up in the answer directly affects interstate rates, or in other words, directly affects interstate commerce, for it directly affects commerce between Nashville and Louisville."

Now, then, here the Pullman Company, as a condition to its continuance to carry passengers upon its cars in intrastate commerce, must pay a tax upon its entire capital stock. The amount of that tax is immaterial. The legislature, under the decision, might make it fifty per cent. The only remedy would be that it must treat all corporations alike under the Fourteenth Amendment. It would, therefore, compel the interstate corporation to withdraw from interstate commerce because it could not possibly pay such a tax, and could not refuse to accept intrastate passengers upon its cars hauled in the railroad's interstate trains. The court below held that the law did not impair the obligations of the contract existing between the railroad and the Pullman Company for the lease of its cars; but the question we are here discussing is not whether the particular contract is impaired, but whether a railroad company hauling Pullman cars is not compelled to accept passengers in those cars both in interstate and intrastate commerce, because it could not discriminate under the laws of Kansas and the laws of Congress; and whether this would not compel the Pullman Company to withdraw from business in Kansas. We do not concede that there was not a contract which the State could not impair within the rules laid down by the decisions of this court. That question is fully argued in the main briefs.

(5) There is one other question which we desire to briefly discuss, and that is whether the court is bound by the construction placed upon the law in the court below. Ordinarily, of course, this court is bound by the construction placed upon State statutes by its courts, and although this statute is general in terms and imposes this tax as a condition to the corporation continuing to do business of any kind in the State, it may be that the construction of the court below, that the tax is required to be paid as a condition to its doing intrastate business, is binding upon this court; but that is not the question in this case. The question is whether the tax is imposed upon all of the corporate property and is therefore an illegal tax; not what the condition is for its enforcement. When it comes to the question of whether a tax is a burden upon interstate commerce, this court judges for itself the scope and extent of such statute (*Galveston, Harrisburg, etc., Railway Company vs. Texas*, 210 U. S., 219). This is not a case like the case of *Osborne vs. Florida* or the case of *Pullman Company vs. Adams*, *supra*. The question in those cases was whether the tax was a direct tax on interstate or State commerce, and the court having held that under the statute the tax itself could only be levied on intrastate commerce, the decision was binding upon the Supreme Court. In the case at bar the court did not hold that the tax was not imposed on the entire capital stock of the corporation representing its entire business and property, but that the tax was levied as a condition to the company continuing to do an intrastate business, and the decree simply excluded the company from that business. The court may follow the decision of the State as to whether under a law a tax may be levied on anything but the local property or business, but this court will always decide for itself whether a tax, admittedly a tax upon its entire capital, is or is not a burden upon interstate commerce.

This being a suit wherein is drawn in question the validity of an authority exercised under a State statute on the ground

that the statute and the authority exercised are, in operation and effect, repugnant to the Constitution of the United States, and the decision of the State court being in favor of the validity of the statute and of the authority exercised and against the plaintiff in error, this court is not concluded by the decision of the Supreme Court of the State of Kansas, but may re-examine upon the writ of error herein. To the rule that this court is bound by the decisions of the highest court of the State there are many exceptions, viz.: Where the State enactment is alleged to be in violation of the contract laws of the Federal Constitution; where it is alleged that the enforcement of the State enactment would deprive the complainant of his property without due process of law, or deny to him the equal protection of the laws; where the State enactment is claimed to be an attempt to invade the Federal domain under the guise of exercise of police power; and where it is alleged that the enactment is an attempt to regulate commerce among the States. In these cases the court will examine and determine for itself whether the enactment does violate the Federal Constitution or invade the Federal domain; in other words, in this case whether this tax on all of the property of the company engaged in inter-state commerce beyond the State is a burden on such commerce, or whether it is not. The cases are numerous in this court. *Gulf, Colorado & Santa Fe Railway vs. Ellis*, 165 U. S., 150; *Atchison, Topeka & Santa Fe Ry. vs. Matthews*, 174 U. S., 96. In the former case the State court was reversed and in the latter case sustained by this court. Indeed in the latter case this court, in commenting upon the former, said (pp. 100, 101):

"It may be suggested that this line of argument leads to the conclusion that a statute of one State whose purpose is declared by its Supreme Court to be a matter of police regulation will be upheld by this court as not in conflict with the Federal Constitution, while a statute of another State, precisely similar in its terms, will be adjudged in conflict

with that Constitution if the Supreme Court of that State interprets its purpose and scope as entirely outside police regulation. But this by no means follows. This court is not concluded by the opinion of the Supreme Court of the State. *Yick Wo v. Hopkins*, 118 U. S., 356, 366. It forms its own independent judgment as to the scope and purpose of a statute, while of course leaning to any interpretation which has been placed upon it by the highest court of the State. We have referred to the interpretation placed upon the respective statutes of Texas and Kansas by their highest courts, not as conclusive, but as an interpretation towards which we ought to lean, and which, in fact, commends itself to our judgment."

In *Morgan's Steamship Company vs. Louisiana*, 118 U. S., 455, the court said (p. 462):

"In all cases of this kind it has been repeatedly held that, when the question is raised whether the State statute is a just exercise of State power or is intended by roundabout means to invade the domain of Federal authority, this court will look into the operation and effect of the statute to discern its purpose."

Also *Schallenberger vs. Pa.*, 171 U. S., 1.
Collins vs. N. H., Id., 30.
Railroad vs. Husen, 95 U. S., 465, 473-4.
Chy Lung vs. Freeman, 92 U. S., 275.
Yick Wo vs. Hopkins, *supra*.

In the *Yick Wo* case this court held that an "erroneous view of the ordinances led the Supreme Court of California into the further error of holding that they were justified by the decisions of this court," etc.

We assert that an erroneous view of the Kansas statute led the Supreme Court of Kansas into the error of holding that their construction was justified by the decisions of this court in *Osborne vs. Florida*, 164 U. S., 650; *Pullman Company vs. Adams*, 189 U. S., 420, instead of within the principles of *Gibbons vs. Ogden*, 9 Wheat., 1; *State Freight Tax Cases*, 15 Wall., 284; *Gloucester Ferry vs. Pennsylvania*, 114 U. S.,

196; Philadelphia Steamship Company *vs.* Pennsylvania, 122 U. S., 326; Fargo *vs.* Michigan, 121 U. S., 230; Galveston, Harrisburg, &c., Ry. Company *vs.* Texas, 210 U. S., 217; as to a tax upon the stock of a corporation being a burden upon interstate commerce, and within the principles laid down in *McCulloch vs. Maryland*, 4 Wheat., 429; Fargo *vs.* Hart, 193 U. S., 490; Union Transit Company *vs.* Kentucky, 199 U. S., 194; Pullman *vs.* Pennsylvania, 141 U. S., 18, and Postal Telegraph *vs.* Adams, 155 U. S., 688, as to burdens which may be laid on instrumentalities of interstate commerce and as to taxation of property beyond the jurisdiction of the State. The Supreme Court of Kansas held that the State statute did not burden interstate commerce. That court could not have decided the case adversely to the plaintiff in error without so deciding that Federal question, and this court therefore has jurisdiction to inquire whether the Supreme Court of Kansas erred in that holding. (*M. K. & T. Ry. vs. Haber*, 169 U. S., 613, 622; *A. C. L. Ry. vs. Wharton*, 207 U. S., 328; *Metropolitan Bank vs. Claggett*, 141 U. S., 520.)

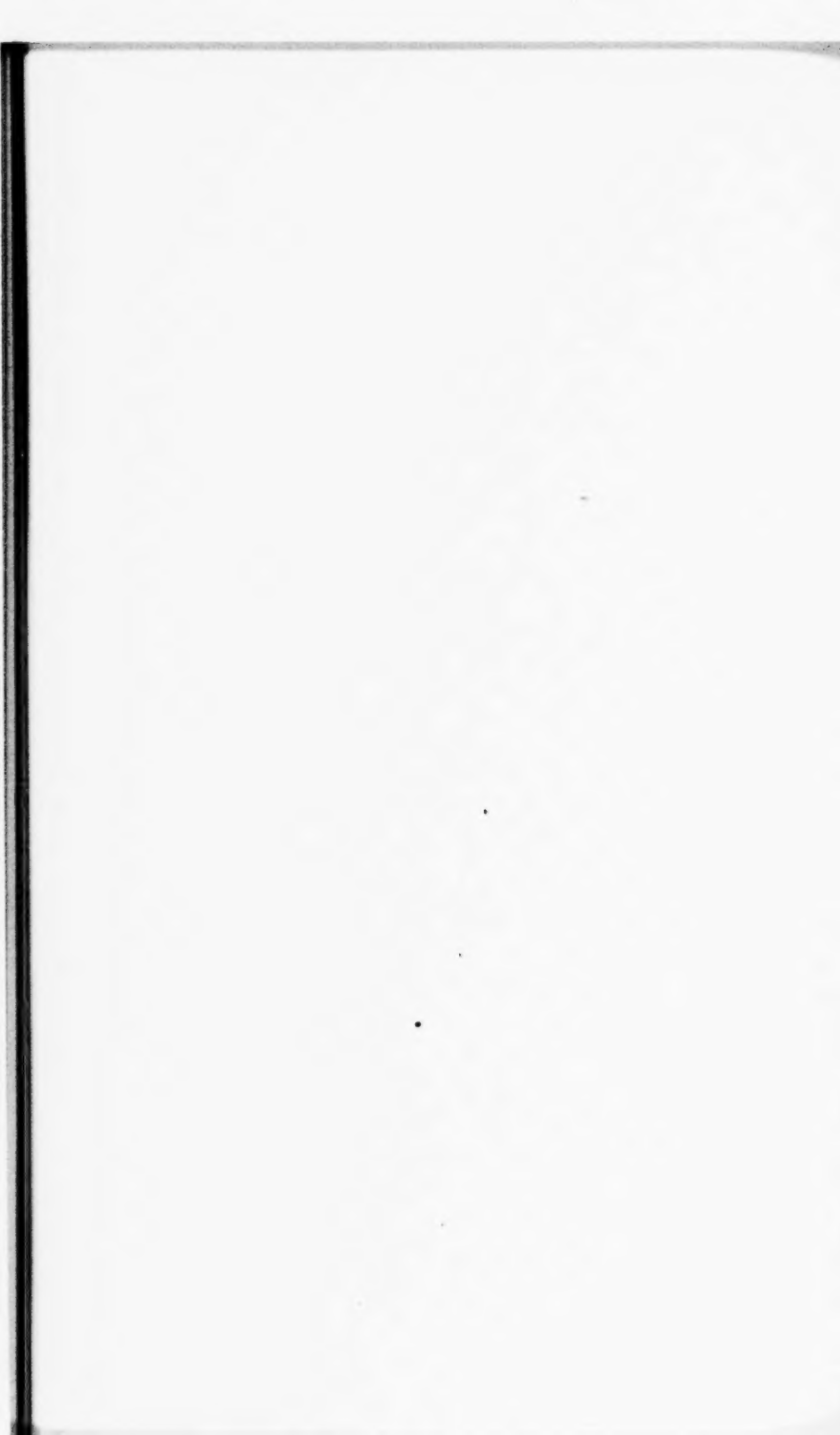
All that the State court did hold was that the tax imposed a condition upon corporations continuing to do business "wholly within the State." This decision was contrary to its previous holding in the case of *American Book Company vs. Kansas*, 65 Kans., 847, and opposed to the view of this court in *The Employers' Liability Cases*, 207 U. S., 463. But, however that may be, the question as to whether this tax upon the entire capital stock was a burden upon interstate commerce is a question for this court.

Very respectfully,

CHARLES BLOOD SMITH,

FRANK B. KELLOGG,

Attorneys and of Counsel for Plaintiff in Error.



APPENDIX.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 4089.

THE PEOPLE OF THE STATE OF COLORADO, *Plaintiff*,

vs.

THE PULLMAN COMPANY, *a Corporation, Defendant.*

Judge's Memorandum.

"This is an action brought by the State of Colorado against the Pullman Company, to recover the sum of \$11,085.00, claimed to be due from the defendant to the State, on account of fees charged against the defendant, upon an increase of its capital stock, under the provision of an act of the General Assembly of Colorado, approved March 13, 1897. This act required every corporation, joint stock company, or association incorporated under any general or special law of the State of Colorado, or under any general or special law of any foreign State or kingdom, or any State or Territory of the United States, beyond the limits of the State of Colorado, having a capital stock in excess of fifty thousand dollars, to pay to the Secretary the sum of fifteen cents on each and every thousand dollars of such excess, and a like sum of fifteen cents on each thousand of the amount of each subsequent increase of stock, and prohibited any of the above mentioned corporations from exercising any corporate powers or doing business in the State, and also prohibited the Secretary of State from filing any certificate of incorporation, articles of association, charter, or certificate of the increase of capital stock, until the fees were paid.

"The defendant company is a corporation which was organized in 1867, under the laws of the State of Illinois, with a capital stock of \$100,000. It now has a capital stock of \$74,000,000. In August, 1892, the defendant company filed a copy of its charter and a certificate of agency, as provided

by the laws of Colorado, with the Secretary of State, and paid to the Secretary of State the sum of \$11.00 for filing its charter, that being the full amount of fees required by the laws of the State at that time. The defendant company at that time had a capital stock of \$30,000,000, which was subsequently increased to the amount above stated.

"The answer admits the increase of capital stock, as alleged in the complaint, but alleges that it never filed with the Secretary of State any certificate of any increase in its capital stock, and denies at the time of filing the complaint, or at any time prior thereto, it was doing business as alleged in the complaint; denies that it was engaged in the business of manufacturing, constructing, purchasing, or selling railway cars, or cars known as parlor, sleeping, or drawing-room cars, or that it was operating any railway or car shops for the manufacture, construction, or repair of railway parlor, sleeping, or drawing-room cars, or other rolling stock for any purpose whatever, but admits that it was furnishing cars to railroad companies, under contracts, under which the railroad companies operating the cars took care of and repaired them; admits that it has maintained one ticket office in the State for the sale of tickets; that by agreement with the railroad companies, operating its cars under contract, tickets for berths and seats were kept on sale in the railroad offices.

"It is then averred in the answer that certain of its cars were furnished, under the contracts as above stated, to certain railroad companies operating within the State of Colorado, but that the greater part of its business, under such contracts, consisted in furnishing to the railroad companies cars to be operated under such contracts, between points within and points without the State and between points in different States, and through the State of Colorado; that it sold tickets upon cars operated in this way, and that the business constituted commerce between the several States.

"It is then averred that the value of its property in the State of Colorado was less than one-two-hundredth ($1/200$) part of the total value represented by its capital stock; that the value of its business done in Colorado has never been more than one-two-hundredth ($1/200$) part of its total business; and that the business done in the State of Colorado otherwise than the business of commerce between States, has never been more than one-thousandth ($1/1000$) part of its total business; that it has never operated any cars within the

State and that it has never done any business in the State except in the manner above mentioned, under the contracts with railway companies; that the only franchise which it exercised in Colorado was the franchise to be a corporation, to do business as such, and to sue and be sued.

"The case is before the court upon a demurrer to the answer and was elaborately and ably argued both orally and by brief. While it would be interesting to review the authorities called to my attention by counsel, yet, because of their number, it would be impracticable to do so, as it would extend this memorandum to unwarranted length. I shall, therefore, at this stage of the case, attempt to do nothing more than to state briefly the conclusions at which my mind has arrived after a most thorough examination and careful consideration of the suggestions of counsel and the decided cases.

"A State undoubtedly has the power to tax the property of foreign corporations engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, provided, always, it be within the jurisdiction of the State, but in a case where the exaction violates the commerce clause of the Constitution of the United States, or involves the assertion of the right of a State to exercise its powers of taxation beyond its geographical limits, the power cannot be sustained, and this is true whether the charge attempted to be laid, be viewed as a tax, a license or a fee. The right to regulate, tax, or impose burdens upon interstate commerce, is, by the Constitution, vested solely and exclusively in Congress.

"The facts, well pleaded in the answer, are, of course, admitted by the demurrer, and show that a very small part of the defendant's business is local to Colorado. The mere fact that the statute designates this charge as a fee, does not necessarily make it one. My study of the case leads me to the conclusion that it is an attempt to lay a tax upon the right of the defendant to do business in the State, and must be regarded as a license or privilege tax. In any event, it is a burden attempted to be imposed upon the defendant for the privilege of engaging in interstate commerce within the State. As shown by the answer, a very small part of the company's business is local to the State of Colorado, yet the fee, which I think is nothing more than a license or *priv-*

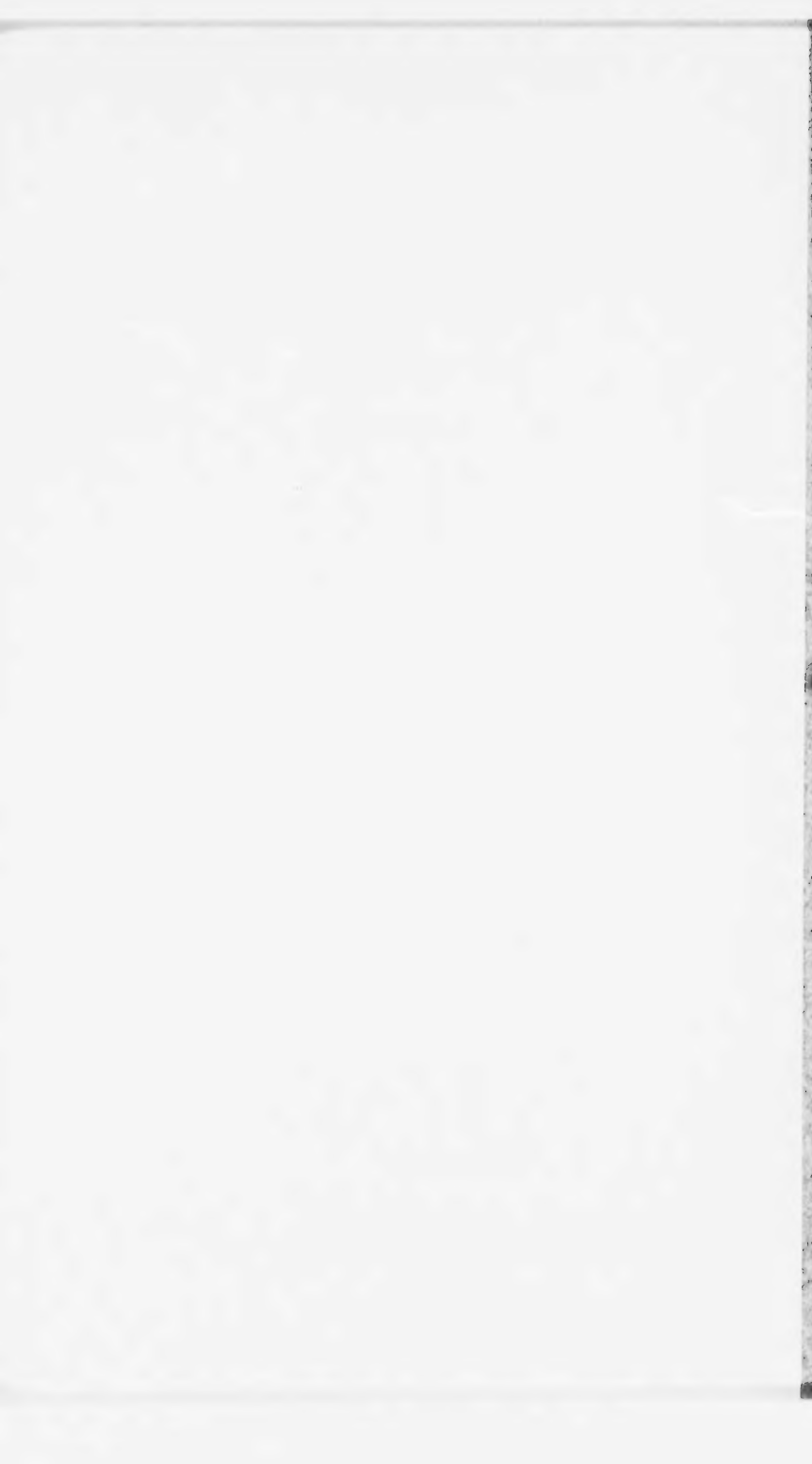
ilege tax, attempted to be imposed by the State, is a unit; there is no attempt to separate or discriminate between the local business and the interstate business, which the answer shows was the principal part of defendant's business, and the rule is well settled that interstate commerce cannot be taxed at all.

Robbins v. Shelby Co. Taxing District, 120 U. S., 489.

"My conclusion is that the case falls within the principle announced in the following cases: *Case of State Freight Tax*, 15 Wall., 232; *Mobile v. Kimball*, 102 U. S., 691; *Western Union Tel. Co. v. Texas*, 105 U. S., 460; *Moran v. New Orleans*, 112 U. S., 69; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S., 196; *Picard v. Pullman Southern Car Co.*, 117 U. S., 34; *Wabash Railway Co. v. Ill.*, 118 U. S., 557; *Robbins v. Shelby Co. Taxing District*, 120 U. S., 489; *Western Union Tel. Co. v. Pendleton*, 112 U. S., 347; *Lesloup v. Port of Mobile*, 127 U. S., 640.

"Let the demurrer be overruled with leave to reply within twenty (20) days.

"(Endorsed.) No. 4089. *The People of the State of Colorado v. The Pullman Company.* Memorandum of opinion on demurrer to answer. Riner, D. J. Filed May 2, 1907. Charles W. Bishop, clerk."





U. S. Supreme Court, U. S.

FILED.

MAR 1 1909

JAMES H. MCKENNEY,

CLERK

In the Supreme Court of the United States.

THE PULLMAN COMPANY,
Plaintiff in Error,

vs.

THE STATE OF KANSAS, on the rela-
tion of C. C. COLEMAN, Attorney-Gen-
eral, *Defendant in Error.*

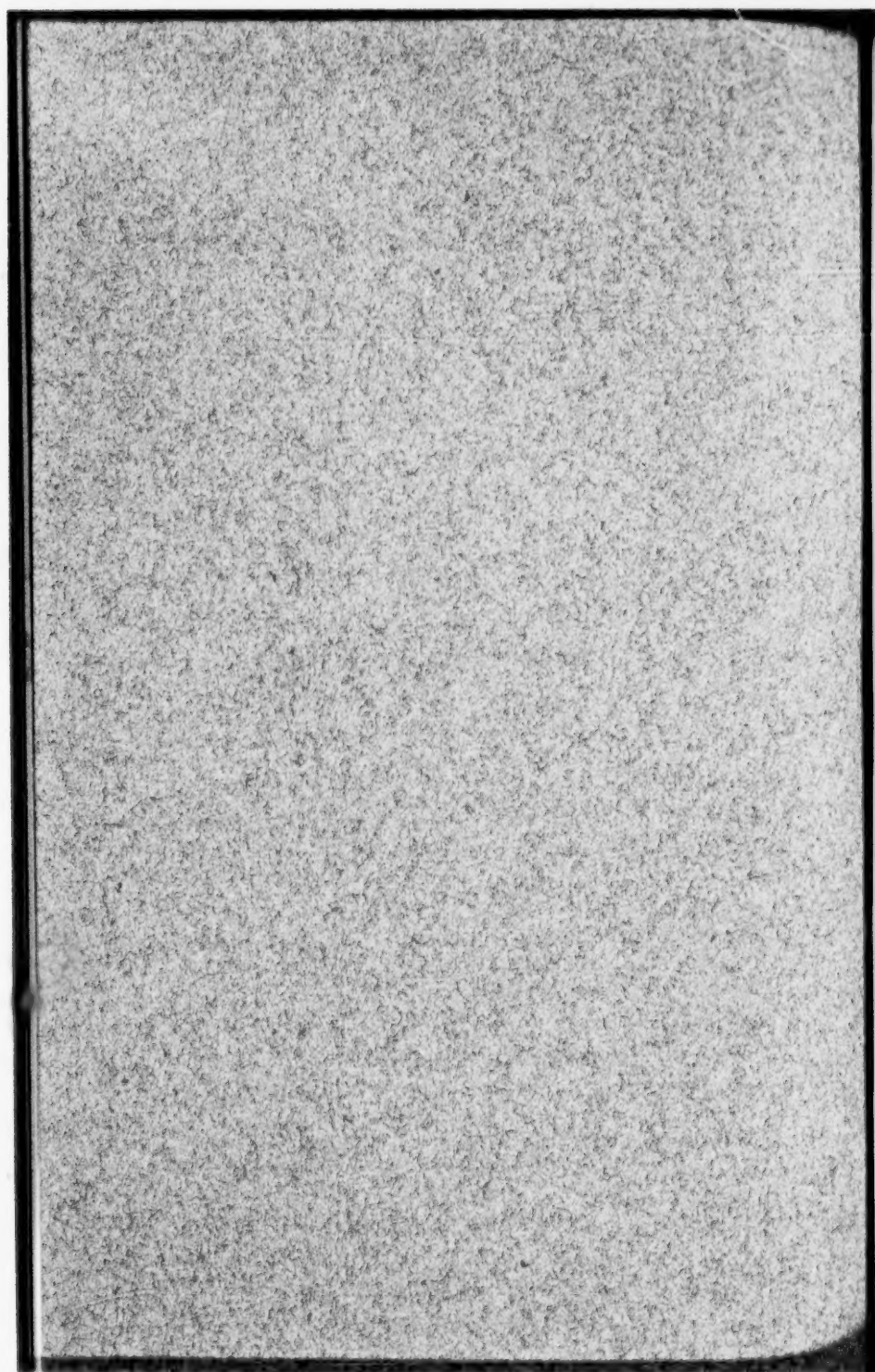
(20,784)

No. 387. 12

BRIEF OF DEFENDANT IN ERROR.

FRED S. JACKSON, Attorney-general,
Attorney for Defendant in Error.

C. C. COLEMAN,
Of Counsel.



In the Supreme Court of the United States.

THE PULLMAN COMPANY,

Plaintiff in Error.

vs.

(20,784)

THE STATE OF KANSAS, on the relation of C. C. COLEMAN, Attorney-General, *Defendant in Error.*

No. 381.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

THE statement of the plaintiff in error makes an additional statement unnecessary, but for the convenience of the court we give here the statute under which The State claims the capitalization fee from the plaintiff in error, the order of the charter board permitting the company to transact business in the state of Kansas and the judgment of the supreme court of Kansas in this suit.

THE STATUTE.

Section 1264 of the Compiled Laws of 1901 is as follows :

" Each corporation which has received authority from the charter board to organize shall, before filing its charter with the secretary of state, as provided by law, pay to the state treasurer of Kansas, for the benefit of the permanent school fund, a charter fee of one-tenth

of one per cent. of its authorized capital upon the first one hundred thousand dollars of its capital stock, or any part thereof; and upon the next four hundred thousand dollars, or any part thereof, one-twentieth of one per cent.; and for each million or major part thereof over and above the sum of five hundred thousand dollars, two hundred dollars. The treasurer shall execute his receipt therefor in triplicate, one of which receipts shall be delivered to the party making the payment, one to the auditor of state, and the other shall be indorsed upon the charter; and it shall be unlawful for the secretary of state to file or accept for filing any charter or to issue a certified copy of any charter of any corporation required by the provisions of this act to pay a charter fee which does not have such receipt for the proper fee indorsed thereon by the state treasurer. In addition to the charter fee herein provided, the secretary of state shall collect a fee of two dollars and fifty cents for filing and recording each charter containing not to exceed ten folios, and an additional fee of twenty-five cents for each folio in excess of ten contained in any charter. The fee for filing and recording a charter shall also entitle the corporation to a certified copy of its charter. All the provisions of this act, including the payment of the fees herein provided, shall apply to foreign corporations seeking to do business in this state, except that, in lieu of their charter, they shall file with the secretary of state a certified copy of their charter, executed by the proper officer of the state, territory or foreign country under whose laws they are incorporated; and any corporation applying for a renewal of its charter shall comply with all the provisions of this act in like manner, and to the same extent as is herein provided for the chartering and organizing of new corporations."

ORDER OF THE CHARTER BOARD.

"The board having under consideration the application of The Pullman Company, a foreign corporation organized under the laws of the state of Illinois, for leave to transact business in the state of Kansas; and it appearing that the said foreign corporation

has, in due form of law, filed with the secretary of state a certified copy of its charter, executed by the proper officers of the state of its domicile, and the written consent, irrevocable, of said corporation that actions may be commenced against it in the proper court of any county in this state in which the cause of action may arise, accompanied by the duly certified copy of the resolution of the board of directors of said corporation authorizing the proper officers to execute the same, it is, upon motion, thereupon ordered that the said application be granted and that said applicant be authorized and empowered to transact business within the state of Kansas, and transacting within the said state its business: provided, that this order shall not take effect and no certificate of such authority shall issue or be delivered to said company until such applicant shall have paid to the state treasurer of Kansas, for the benefit of the permanent school fund, the sum of \$20,100, being the charter fees provided by law necessary to be paid by a foreign corporation with a capital of 100 million dollars.

"It is further understood, ordered and provided that nothing herein contained shall apply to nor be construed as restricting in any wise the transaction by the said applicant of its interstate business nor its business for the federal government; but that this grant of authority and the requirements as to payment relate only to the business transacted wholly within the state of Kansas."

JUDGMENT OF THE COURT.

"Wherefore, it is decreed, ordered and adjudged that the defendant, The Pullman Company, a corporation, be ousted, prohibited, restrained and enjoined from transacting any and all corporate business within the state of Kansas and that it be ousted, prohibited, restrained and enjoined from transacting intrastate business in Kansas as a corporation. It is further ordered and decreed that this judgment shall in no wise affect the interstate commerce of the business of this defendant, nor restrict it in the execution thereof, and it is further ordered and provided that this decree

shall not affect any of the contracts, obligations, or corporate duties of this defendant corporation to or with the government of the United States in any manner whatsoever."

ARGUMENT.

We ask the attention of the court to the question of jurisdiction, as the record of this cause and the brief of the plaintiff in error does not show that a constitutional question is involved in the controversy; and to sustain our views we rely on the following points of law:

I.

"A question of state law alone does not present a federal question so as to give the supreme court jurisdiction over a state judgment. The judgment of the state court is final."

(*Nonconnah v. Turnpike Co.*, 24 U. S., L. Ed., 368.)

II.

The supreme court of the United States will not take jurisdiction to review a judgment of the state supreme court which depends not upon the constitutionality of the statute but upon the court's construction of the statute admitted to be valid.

III.

The granting of rights and privileges which constitute the franchises of the corporation are matters resting entirely within the control of the legislature of the state and may be accompanied with any such conditions as the legislature may think suitable to the public interest and policy.

The judgment complained of is one founded upon the construction and interpretation of a state statute by the highest court of the state, and such judgment will not be reviewed by this court. Indeed, it is not claimed by the plaintiff in error that the statute under considera-

tion by the supreme court of Kansas is a void statute, but it is admitted that the statute is valid and applies to all domestic and foreign corporations permitted to transact business in the state, except those similarly situated to this corporation, the plaintiff in error; and that the plaintiff in error is made amenable to its provisions through misconstruction of the statute by the supreme court of the state which enacted it. The whole controversy may be summed up in the statement that the plaintiff in error claims it is not liable to the payment of the capitalization taxes sought to be enforced by the state of Kansas, because it was transacting business in the state prior to the time of the enactment of the statute. We submit in all fairness that this presents the clearest kind of a case for the interpretation of a state statute by a state court and its application to a given state of facts. We cite a few of the well-known cases of this court where this question has been under consideration.

"Where this court can see that the decision of a state court depended not upon the question of the *constitutionality* of a state statute, but upon its *construction*, it will not take jurisdiction of the case under the twenty-fifth section of the judiciary act."

McBride v. Hoey, 11 Pet. 167.

"Where the state court founded its judgment upon a state constitutional provision and prior state adjudication, and the constitution only declared a settled state rule of jurisprudence, this court cannot take jurisdiction over such judgment."

Bank v. Bank, 14 Wall. 432.

"The construction and effect given by the supreme court of the state to the statute of limitations enacted by the state legislature is not subject to reexamination here under a writ of error to a state court."

Harrison v. Myer, 92 U. S. 111.

“ Did the decision of this point draw in question the validity of either of these statutes, on the ground of repugnancy to the constitution of the United States? Or was the court merely called upon to decide on their construction?

“ We are of the opinion that there can be but one answer to these questions, and but few words necessary to demonstrate its correctness.

“ It is too plain for argument that, if the act of incorporation had stated, in clear and distinct terms, that the bank should be liable, in case of refusal to pay its notes, to pay twelve per cent. damages in addition to the interest of six per cent. imposed by the act of 1824, the validity of neither of the statutes could be questioned on account of repugnancy to the constitution. *But the allegation of the plaintiff's counsel is, that the statute of 1824 was not intended by the legislature to apply to their charter, and that the court erred in their construction of it; and therefore made it unconstitutional by their misconstruction. A most strange conclusion from such premises.*

“ *But grant that the decision of that court could have this effect, it would not make a case for the jurisdiction of this court, whose aid can be invoked only where an act alleged to be repugnant to the constitution of the United States has been decided by the state court to be valid, and not where an act admitted to be valid has been misconstrued by the court. For it is conceded that the act of 1824 is valid and constitutional, whether it applies to the plaintiff's charter or not; and if so, it follows, as a necessary consequence, that the question submitted to the court and decided by them was one of construction, and not of validity. They were called upon to decide what was the true construction of the act of 1829, and what was the meaning of the phrase ‘additional damages,’ as there used, and not to declare the act of 1824 unconstitutional. If this court were to assume jurisdiction of this case, it is evident that the question submitted for our decision would be, not whether the statutes of Ohio are repugnant to the constitution of the United States, but whether the supreme court of Ohio has erred in its construction of them. It is the peculiar province and privilege of the state*

courts to construe their own statutes; and it is no part of the functions of this court to review their decisions or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors committed by their judiciary."

Bank v. Buckingham, 5 How. 317.

Applying the remarks of the court above quoted to the present case, if this court were to assume jurisdiction in this case, it is evident that the question submitted to this court would be, not whether the statute of Kansas, above quoted, is repugnant to the constitution of the United States, but whether the supreme court of Kansas *has erred in the construction of the statute*. It is clear that the plaintiff in error asks this court, not to pass upon the constitutionality of the statute, but for the correction of what he claims to be an error committed by the supreme court of Kansas in its interpretation of the statute.

In the case of Nonconnah v. Turnpike Co., 24 U. S. (L. Ed.) 368 (not reported in the official edition), a judgment of the supreme court of the state of Tennessee had decreed that the charter of the corporation should be forfeited and annulled, and the company enjoined from doing any business in Tennessee, on account of failure of the corporation to fulfill certain requirements of the state law. Evidence was presented to this court upon the alleged ground that the action of the state court was a breach of a state contract. Chief Justice WAITE, in dismissing the case upon motion, declared the law to be that --

"A question of state law alone does not present a federal question so as to give this court jurisdiction over a state judgment. The judgment of the state court is final.

“Whether the failure of a company incorporated by a state to complete its road within the time limited was such a non-compliance with its charter as to subject it to a decree of forfeiture, is a question of state law alone.”

It will be hard to find a case more clearly in point on the principles of law involved in the case at bar than the case cited above. Here the sole question is whether this corporation seeking to transact a purely domestic business in the state of Kansas is compelled to pay the fees levied by the state through its statute upon such corporations. The company claims that if the statute were correctly construed it would not be compelled to pay this amount. The State holds differently, and when the supreme court of the State adopts the construction contended for by the State, a question of state law and state law only is presented.

In the case of *Smiley v. Kansas*, 196 U. S. 447, the same principle was again restated by this court, saying:

“The scope and meaning of a state statute as determined by the highest court of the state conclude the federal supreme court in determining, on writ of error to the state court, whether or not such statute violates the federal constitution.”

And in that case this court adopted the construction of the statute placed upon it by the Kansas supreme court.

II AND III

The plaintiff in error assumes the right by reason of the lapse of time and of having been in the exercise and enjoyment of its corporate rights within this state for many years prior to the adoption of the statute in question, to maintain and carry on its business within the state of Kansas even without the consent of the State, and that the requirements of the laws of this state, if it did pay the charter fees required by the state, would be subjecting it to unreasonable taxes and depriving it of

the equal protection of the laws, because other persons and corporations are permitted to engage in business within the state without the payment of such taxes. None of these things are found to be true, by the supreme court of Kansas, and are not true. All foreign corporations doing business within the state, as well as all domestic corporations, are required by these statutes to pay charter fees measured by the amount of their invested capital. Any other foreign corporation engaged in the same business would be liable to pay the same fees—if of a larger capital stock a larger fee would be required; if having a smaller capital stock the fee would be correspondingly smaller. The State exercises no discrimination against the defendant. In this suit the state seeks only the enforcement of its own general statutes as applied to a foreign corporation doing business within the state and specifically limits its claim to the business done wholly within the state and limits its right of recovery to the principle of its own statutes. This presents a case not cognizable by the federal court and which under the uniform decisions of the supreme court of the United States presents no question of the constitutional rights of the plaintiff in error.

We cannot do better for the argument of this point than to quote from the decision of the Horn Silver Mining Co. v. New York, 143 U. S. 305, 36 L. Ed. 168.

"The granting of the rights and privileges which constitute the franchises of a corporation being a matter resting entirely within the control of the legislature, to be exercised in its good pleasure, it may be accompanied with *any such conditions as the legislature may deem most suitable* to the public interests and policy. It may impose as a condition of the grant, *as well as, also, of its continued exercise*, the payment of a specific sum to the state each year, or a portion of the profits or gross receipts of the corporation, and may prescribe such mode in which the sum shall be ascertained as may be deemed

convenient and just. There is no constitutional prohibition against the legislature adopting *any mode* to arrive at the sum which it will exact as a condition of the creation of the corporation or of its continued existence. There can be, therefore, no possible objection to the validity of the tax, prescribed by the statute of New York, so far as it relates to its own corporation. Nor can there be any greater objection to a similar tax upon a *foreign corporation* doing business by its permission within the state. As to a foreign corporation—and all corporations in states other than the state of its creation are deemed to be foreign corporations—it can claim a right *to do business in another state to any extent, only subject to the conditions imposed by its laws.*

“As said in *Paul v. Virginia*, 75 U. S. 8 Wall. 168 (19 L. Ed. 357, 360), ‘the recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states, a comity which is never extended where the existence of the corporation or the exercise of its powers is prejudicial to their interests or repugnant to their policy, having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion.’

“This doctrine has been so frequently declared by this court that it must be deemed no longer a matter of discussion, if any question can ever be considered at rest.

“Only two exceptions or qualifications have been attached to it in all the numerous adjudications in which the subject has been considered, since the judgment of this court was announced more than a half-century ago in *Bank of Augusta v. Earle*, 38 U. S., 13 Pet. 519 (10 L. Ed. 274). One of these qualifications is that the

state cannot *exclude from its limits* a corporation engaged in interstate or foreign commerce, established by the decision in *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 12 (24 L. Ed. 708, 711). The other limitation on the power of the state is, where the corporation is in the employ of the general government, an obvious exception, first stated, we think, by the late Mr. Justice BRADLEY in *Stockton v. Balt. & N. Y. R. Co.*, 32 Fed. 9, 14. As that learned justice said: 'If Congress should employ a corporation of ship-builders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any state in the Union.' And this court, in citing this passage, added, 'without the permission and against the prohibition of the state.' *Pembina Con. S. Min. & Mill Co. v. Pennsylvania*, 125 U. S. 181, 186 (31 L. Ed. 650, 652).

"Having the absolute power of excluding the foreign corporation, the state may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient; and it may make the grant or privilege expedient upon the payment of a specific *license tax*, or a sum *proportioned to the amount of its capital*. No individual member of the corporation or the corporation itself can call in question the validity of any exaction which the state may require for the grant of its privileges. It does not lie in any foreign corporation to complain that it is subjected to the same law with the domestic corporation. The counsel for the appellant objects that the statute of New York is to be treated as a tax law, and not as a license to the corporation for permission to do business in the state. Conceding such to be the case, we do not perceive how it in any respect affects the validity of the tax. However it may be regarded, it is the condition upon which a foreign corporation can do business in the state, and in doing such business it *puts itself under the law of the state*, however that may be characterized."

The statute under consideration in the case last quoted had many features analogous to our own, while different in many essential points. It provided an *annual tax upon the franchises or business* of the corpora-

tion, to be computed upon the capital stock of the foreign corporation by a certain percentage measured by the dividend on the par value of the stock; or if no dividend, then on the actual value of the stock, to be ascertained in a way pointed out. The stock of the corporation plaintiff in that case was \$10,000,000, but a small portion of which was employed or invested in the state of New York. The franchise tax claimed in that case was for two years, and, with penalties provided by the law, amounted to more than \$40,000. It was urged in that case, much the same as claimed in this, that the franchise or license tax was unreasonable, a burden upon interstate commerce, the taking of property without due process of law, etc. It is worthy of note that the capital stock involved was only one-tenth of that in this case, while the license tax, for two years only, was nearly twice that claimed in this case *for all time*. That was an *annual* tax upon the franchise. This is a franchise fee which, once paid, covers the entire future. The opinion in the Horn Silver Mining Company case is quoted here so fully for its bearing upon the far-reaching power of a state in the matter of dealing with foreign corporations. We shall take occasion to refer to it again upon another branch of the case.

In *People, ex rel., v. Roberts*, 171 U. S. 661, 43 L. Ed. 323, Mr. Justice SHIRAS said:

"It must be regarded as finally settled by frequent decisions of this court that, subject to certain limitations as respects interstate and foreign commerce, a state may impose such conditions upon permitting a foreign corporation to do business within its limits as it may judge expedient; and that it may take the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital used within the state. *Paul v. Virginia*, 8 Wall. 168 (19 L. Ed. 357); *Horn Silver Mining Co. v. New York*, 143 U. S. 305 (36 L. Ed. 164)."

In *Minot v. Railroad Co.* (Delaware railroad tax), 18 Wall. 206, 21 L. Ed. 888-898, the same court said :

"The state may impose taxes upon the corporation *as an entity* existing under the laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, *however arbitrary or capricious*, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the state ; our only concern is with the validity of the tax ; all else lies beyond the domain of our jurisdiction."

Special attention is called to the fact that in the case cited the defendant was not a mere business or manufacturing corporation, but was a public-service corporation—a railroad company engaged in interstate commerce as well as in domestic commerce.

Does it not, then, ill become any corporation to say to the state, "We will not comply with your law, and in so far as we have complied with its *forms*, it is *ex gratia*; we owe no allegiance to the state; yet we will transact our business within its borders and claim the protection of its laws?"

In this action, the State calls the defendant to account in this court, and calls upon it in *quo warranto* to answer by what authority it essays to exercise within the state its corporate functions in respect to *internal* and *intra-state* business. Unless some good, substantial and tangible reason can be given by the defendant why it is not subject to the law as laid down in the great opinions herein quoted, then it must submit to the statutes of this commonwealth or retire, in this state, from the classes of business which are within the State's control. The burden of establishing such reasons is on the defendant, all presumptions being in favor of the power of The State to control the exercise of corporate functions.

"Original jurisdiction in *quo warranto* is conferred upon the supreme court by the constitution; and this jurisdiction so conferred is just what was understood by *quo warranto* when the constitution was adopted."

The State v. Wilson, 30 Kan. 665.

THE DEFENSE.

In view of the learned opinion of the supreme court of Kansas, sustaining the view of the State, and the exhaustive citation of authorities contained in it, it is wholly unnecessary to go into an extended discussion of the questions involved in the case. We content ourselves with an attempt to state the main points of law and to reply to the authorities cited by plaintiff, which have been decided since the opinion was written in this case. We submit that the following points of law fully cover the case.

I. A state statute which imposes upon all foreign corporations seeking to transact business in the state a capitalization fee based upon the entire capital stock of each corporation subject to its provisions as a condition precedent to granting such corporation permission to commence or continue business within the state, is wholly within the authority of the state.

II. A construction of such a statute by the supreme court of the state enacting it, which makes the provisions of the law applicable to corporations which apply to commence business in the state after the enactment of the statute as well as to those which continue business after its enactment, presents a question of state law only and will not be inquired into by the supreme court of the United States.

III. Such a construction of a state statute does not impair the obligations of contracts, growing out of the relation of the state and such foreign corporations or

existing between them and other persons, nor does it interfere with interstate commerce, or the obligations of any federal agency in transacting federal business.

I.

(a) The plaintiff in error, the answer claims, was already in the state and for many years had been exercising therein all its functions, and had acquired vested rights therein before the enactment of the present law, or any law requiring the payment of charter fees.

The statute is general. It must be of uniform operation. Section 1, article 12, of the state constitution provides that “. . . corporations may be created under general laws, but *all such laws may be amended or repealed.*” It is by virtue of the same prerogative under which the statute creates domestic corporations that it grants to foreign corporations the right to exist within its borders. The right of repeal or amendment reserved to the state by the constitution is a part of the state's contract with every corporation authorized to exist or operate within its borders, whether domestic or foreign. And it is to be hoped that the time will never come when any corporation can become too thoroughly enthroned to be less than now subject to the state's control.

The supreme court of Kansas had settled this question, however, prior to this suit.

“Section 2 of chapter 10, Laws of 1898 (Gen. Stat. 1901, § 1260), does not discriminate, in its requirements, between foreign corporations which had theretofore been doing business in this state and those which might thereafter apply to do business.

“Foreign corporations engaged in interstate trade are subject to the regulations of chapter 10, Laws of 1898 (Gen. Stat. 1901, § 159 *et seq.*) While it may be that such corporations cannot be excluded from doing inter-

state business in this state, yet they can be laid under such reasonable conditions as the filing of their charters, the *payment of charter fees*, the making of reports and furnishing of information concerning their business, the appointment of agents to receive service of process, etc. These are not burdens on the company—they are measures of justice and protection to the people of the state.”

The State, *ex rel.*, v. American Book Co., 65 Kan. 847.

(b) The plaintiff in error further claims that the statute and the interpretation given by the supreme court discriminates against foreign corporations and in favor of domestic corporations.

The principal difficulty with this charge is that it is not true. The law under which domestic corporations, for any purpose, may be organized in this state requires the payment of charter fees estimated upon exactly the same basis now required of the plaintiff in error. Independently of whether it would do domestic or interstate business, or both; and independently of the situs of its property, whether in this state or not; and the charter fee of a domestic company would be the same even if it had not a single dollar of its capital invested in this state, and never expected to have, as the fee of this company. Such being the case, this portion of the plaintiff in error's contention falls to the ground.

(c) It is further claimed that the enforcement of the law as against the plaintiff in error as prayed for in this case would be in contravention of that portion of the fourteenth amendment which declares, “nor shall any state deprive any person of life, liberty or property without due process of law.”

(1) Because the license fee so imposed would be a tax in addition to all state, county and municipal taxes

upon its property located in the state which it has paid, and a tax upon its property outside the state.

First. The charter fee imposed by law is not a *tax* in any proper or legal sense of the term. It is not levied upon the property of the plaintiff in error nor its capital stock. It is merely the *price of a privilege* which the state may grant or withhold, which price is measured by the capital stock as a convenient method of measurement. The price of the privilege to the foreign and domestic corporations is estimated in the same way. By way of illustration: A corporation may be formed in this state to transact a general telegraph business under the very section of the law to which it is sought to subject the plaintiff in error. If its capital stock authorized by its charter be 100 million dollars, although every dollar of its capital were invested beyond the borders of this state, and although all its property might be employed, or intended so to be, in interstate commerce, we think no court, state or federal, would ever say that the state could not collect such a fee for the privilege granted in such a charter, or could not refuse to grant the charter without the payment of such fee. Has a foreign corporation greater rights as against The State, and greater freedom under its laws, than one of its own creation? Must the state, without any license fee, permit a foreign corporation to transact business which is wholly within its jurisdiction which it would deny to a corporation of its own creation without the payment of the fee? Does not the mere statement of the question compel a negative answer?

Horn Silver Mining Co. v. State, 143 U. S. 305, 36 L. Ed. 164.

Postal Telegraph Co. v. City, 43 S. E. 207.

Second. The mere fact that indirectly and incidentally the effect of the enforcement of the state law upon a

subject-matter within the state's jurisdiction may cause expense or inconvenience to the person or corporation upon which such enforcement operates does not subject the law to the criticism that it takes without due process of law. Statutes have been sustained against this objection requiring a charge for the use of streets, poles, wires, etc. :

St. Louis v. Western Union, 148 U. S. 92.

Postal Tel. Co. v. Baltimore, 156 U. S. 210.

Western Union Tel. Co. v. New Hope, 187 U. S. 427.

And requiring wires to be placed underground :

People v. Squire, 145 U. S. 175.

So in a recent case the supreme court of the United States had under consideration a statute of the state of Missouri regulating, or attempting to regulate, the sale of intoxicating liquors, in which it was claimed that the operation of the law had the effect of impeding, hindering and hampering interstate business in the articles subject to the law by reason of discouraging and preventing importations and trade. The supreme court of the United States said :

“ If when a state has but exerted the power lawfully conferred upon it by the act of Congress its action becomes void as an interference with commerce because of the reflex or indirect influence arising from the exercise of the lawful authority, the result would be that a state might exercise its power to control or regulate liquors, yet if it did so its action would amount to a regulation of commerce and be void. And this would be but to say at one and the same time that the power could and could not be exercised. But the proposition would have a much more serious result, since to uphold it would overthrow the *distinction between direct and indirect burdens* upon interstate commerce by means of which the harmonious workings of our constitutional system have been made possible.”

Pabst Brewing Co. v. Crenshaw, 198 U. S. 7-30.

See also, in this connection, *Lumberville, etc., Co. v. Board of County Commissioners*, 26 Atl. 711.

It will be noted that the supreme court refers with particular force to the distinction between a *direct* burden upon commerce caused by the operation of state laws, and that resulting *indirectly*, clearly holding that any effect which is merely indirect and incidental is not within the constitutional prohibition.

(d) *The plaintiff in error further claims that to require it to pay charter fees, or in default of payment to deprive it of the right to transact domestic or intra-state business, would be an interference with interstate commerce prohibited by the constitution, and also an illegal interference with its business as an agency of the United States government.*

The discussion of this part of the defense may be conveniently divided into two parts: (a) the authority of the state over the intra-state business of a corporation engaged in both intra-state and interstate commerce; (b) the question whether a franchise fee based upon or estimated upon the entire capital stock of such a corporation is a regulation or hindrance to interstate commerce.

The state's authority over the intra-state business of such a corporation.

The only serious questions on the first of these propositions have been those growing out of the construction of particular statutes, rather than out of any attempt to deny the right of the state to regulate, and otherwise exercise its authority over, the domestic business of a corporation which is also engaged in interstate commerce. The questions have usually been: Does the statute in question apply only to the business of this company within the state? Does it provide for its enforcement without prohibiting or hindering the interstate business of the company? If those questions can be answered in

the affirmative the law is not unconstitutional, and has been uniformly sustained.

We assume that there is and can be no difference between a domestic and a foreign corporation in this respect. If a state loses its authority over a foreign corporation and its right to prohibit it from transacting business within the state merely because the corporation engages in interstate commerce, it would also lose the same authority over the corporation organized under its own laws, the moment such corporation engaged in interstate commerce. It would only be a step further, before we would be compelled to say that a state would lose entirely its right to regulate the business of all corporations when they become interested in any way in interstate commerce.

The truth is, that the courts, in order to protect the rights of the state in the exercise of its police power, the right of local taxation, and the much broader and more important right of granting or withholding corporate franchises, have in many decisions clearly defined the rule stated above.

We now direct the attention of the court to some of these decisions :

“ Where the subjects of taxation can be separated, so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state, the court will act upon this distinction, and will restrain the tax on interstate commerce, while permitting the state to collect that upon commerce wholly within its own territory.

“ The telegraph is an instrument of commerce.

“ A single tax, assessed under the statutes of Ohio, upon the receipts of a telegraph company, which were derived partly from interstate commerce, and partly from commerce within the state, but which were returned and assessed in gross and without separation or apportionment, is not wholly invalid, but is invalid

only in proportion to the extent that such receipts were derived from interstate commerce.

"The collection of the taxes on that portion of the receipts derived from interstate commerce should be enjoined, and the treasurer should be permitted to collect the other tax upon property of the company and upon the receipts derived from commerce entirely within the limits of the state."

Ratterman v. Western Union, 127 U. S. 411, 32 L. Ed. 229.

"A tax, though nominally upon the shares of the capital stock of the company, is, in effect, a tax upon it on account of property owned and used by it in the state, where the proportion of the length of its lines in the state to their entire length is the basis for ascertaining the value of the property; and such tax is not forbidden by the acceptance, by the telegraph company, of the right conferred by section 5263, Revised Statutes, or by the commerce clause of the constitution."

Western Union Tel. Co. v. Massachusetts, 125 U. S. 530, 31 L. Ed. 790.

"By the settled doctrine of this court, the police power extends at least to the protection of the rights, the health and the property of the community against the injurious exercise by any citizen of his own rights. State legislation, strictly and legitimately for police purposes, does not, in the sense of the constitution, necessarily entrench upon any authority which has been confided, expressly or by implication, to the national government."

Western Union v. Mayor of New York, 38 Fed. 352.

"A state has a right, as a measure of police protection, to require the discontinuance of any manufacture or traffic."

Minn. & St. Louis Rly. Co. v. Beckwith, 129 U. S. 26, 32 L. Ed. 585.

"An act of Ohio, April 27, 1893, imposing a tax on

telegraph, telephone and express companies, is not invalid under the constitution either because the assessment is made on property used largely in interstate commerce or because the rule of assessment requires the property to be valued as a unit profit-producing plant, or because the assessors are required to look to the value of the capital stock as a factor in determining the assessment."

Sanford v. Poe, 69 Fed. 546, 16 C. C. A. 305, 37 U. S. App. 378.

In connection with this question, we call the attention of the court to the fact that all of the above decisions recognize the principle that the state has the exclusive right to determine the manner in which it shall exercise its authority over such corporations, and that the federal court will not interfere with the state in the honest exercise of its discretion in an attempt to regulate the corporation engaged in both foreign and domestic commerce, when the regulation is an evident attempt to regulate *only* the domestic business of such corporation. Additional authorities to this effect are as follows :

"This court will not hold a tax void because, if called upon, it might have adopted a different system or rule for ascertaining the taxable value on which the percentage of taxation should be arrived at, provided the rule is not unfair or unjust."

Western Union Tel. Co. v. Massachusetts, 125 U. S. 530, 31 L. Ed. 790.

"The state may impose taxes upon the corporation as an entity existing under its laws as well as upon the capital stock of the corporation, or its separate corporate property. And the manner in which its value was to be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion."

Delaware Railroad Tax, 18 Wall. 206, 21 L. Ed. 888.

"As it was within the discretion of the state to withhold or grant the privilege of exercising corporate existence, it was a necessary resultant also within its power to impose whatever conditions it might deem fit as a prerequisite to corporate life."

Ashley v. Ryan, 153 U. S. 436.

"A tax upon a franchise of a domestic corporation empowered to do an interstate business, even if actually *exclusively* engaged therein, is not invalid."

Honduras Com. Co. v. State Board, 54 N. Y. 278.

"The right of a state to exact any sum it chooses to name or computes by any means as a condition precedent to the consolidation of railroad companies incorporated in other states, and to acquire the rights and privileges of its incorporation in the state, is constitutional."

Ashley v. Ryan, 153 U. S. 436.

The discussion of the proposition in the case last cited is very interesting and instructive and is a powerful argument in favor of the defendant in error's contention in the case at bar. We respectfully ask the attention of the court to the entire opinion.

See, also, Henderson Bridge Co. v. Kentucky, 166 U. S. 150.

Louisville & Jefferson Ferry Co. v. Kentucky, 183 U. S. 385.

"The only limitation upon the power of a state to exclude a foreign corporation from doing business within its limits arises where the corporation is in the employ of the federal government or where its business is *strictly commerce, interstate or federal*."

Pembina, &c., v. Pennsylvania, 125 U. S. 181-190.

We desire to call the special attention of the court to the case of Postal Tel. Co. v. City of Charleston, 153 U. S. 692, 38 L. Ed. 871. In that case the court had under consideration an ordinance of the city of Charleston pro-

viding that "Telegraph companies or agencies, each for business done exclusively within the city of Charleston, and not including any business done to or from points without the state, and not including any business done for the government of the United States, its officers or agents, \$500." This was an annual tax imposed by the city of Charleston. The company objected to the payment of the tax on substantially the same grounds urged in this case. The supreme court, speaking by Justice SHIRAS, said :

"The express terms of the ordinance restrict the tax to 'business done exclusively within the city of Charleston, and not including any business done to or from points without the state, and not including any business done for the government of the United States, its officers or agents.'

"It is claimed that the Postal Telegraph Cable Company is not within the terms of this ordinance, because it does not do any business exclusively within the city of Charleston; that its city offices are merely its initial points for sending and receiving messages, and that, irrespective of the messages sent or received outside of the state, the intra-state messages are not between points within the city; and that if license exactions were allowed to and made by the various cities in the state, great injury and wrong would be done to the telegraph company.

"But this is a hardship, if such exists, that it is not within our province to redress. If business done wholly within a state is within the taxing power of the state, the courts of the United States cannot review or correct the action of the state in the exercise of that power.

"It is further contended that the ruling of the cited cases does not cover the case of a telegraph company which has constructed its lines along the post-roads in the city of Charleston, and elsewhere, and which is exercising its functions under the act of Congress as an agency of the government of the United States. It is obvious that the advantages or privileges that are con-

ferred upon the company by the act of July 24, 1866 (Rev. Stat. §§ 5263-5268), are in the line of authority to construct and maintain its lines as a means or instrument of interstate commerce, and are not necessarily inconsistent with a right on the part of the state in which business is done and property acquired to tax the same within the limitations pointed out in the cases heretofore cited."

And in stating the law applicable to the facts the court say :

"1. An ordinance of a city imposing a license fee upon every telegraph company, or agency, doing business in the city, for business done exclusively in the city, not including the business done to and from points without the state or business done for the government, its officers and agents, is not void as an interference with interstate commerce.

"2. Messages of a telegraph company sent and delivered entirely within the state are subject to its taxing power."

The supreme court of the state of Virginia, on January 15, 1903, had under consideration a case strongly analogous to the case at bar. The first paragraph of the syllabus is in the following words :

"Norfolk city ordinance No. 126 provides that any corporation engaged in sending telegrams to and from the city of Norfolk to or from points within the state of Virginia, excepting telegrams sent to or received by the government of the United States or of the state or its agents or officers, shall pay a license tax of \$250, and in addition \$1 for each pole, and \$1 for each 100 feet of conduits on the streets or alleys of the city owned by such person or corporation. Ordinance No. 138 declares that nothing contained therein shall be construed as imposing a license tax on, or otherwise regulating or restricting, foreign or interstate commerce, and any business or portion thereof which is embraced in the term 'interstate commerce' or in the term 'foreign commerce.' *Held*, that ordinance No. 126 only attempted to license

state business, and was, therefore, not in violation of the constitution of the United States, article 1, section 8, conferring on Congress sole power to regulate commerce among the several states.

Postal Tel. Co. v. Norfolk, 43 S. E. 297.

The plaintiff in error claims that it entered into business in the state while the territorial government was still in existence, and has continued to transact business under the state government at the invitation of the state government, and has entered into contracts with the railroads and others in the state on faith of such invitation to transact business, and that, therefore, the Bush law has the effect of impairing its contract with the state and such other parties and in violation of the constitution of the United States.

It is to be remembered that the Bush law is the first attempt on the part of the state to regulate foreign corporations or to permit their entrance into the state for the transaction of business. No fees of any kind were required or received from them by the state, and any rights enjoyed by such companies were enjoyed merely as a matter of comity. We quote what is said in the opinion of the Kansas supreme court, in the *Western Union* case, on this question :

"The defense that the defendant came rightfully into the territory of Kansas and has been the beneficiary of certain complaisant acts of the state and territorial legislatures is clearly demurrable. None of those acts has either the form or the effect of a contract exempting the defendant from future legislation made necessary by the needs and changed conditions of the people of Kansas, and rights are not taken from the public or given to a corporation without the clearest disclosure of a positive intention to do so. The defendant came into the state as a foreign corporation and has remained here as a foreign corporation. It came subject to the right to make all necessary modifications of the laws then in existence, and subject to the adoption of future constitu-

tional provisions and future general legislation. The fact that it entered without the payment of license fees gave it no vested right to remain unlicensed. Such a derogation from the power of the legislature must be found in express words somewhere in the constitution or a legislative act, or must follow by implication equally decisive with express words, or it cannot be suffered. Among the numerous decisions of the supreme court of the United States which establish and elaborate these rules are the following: *Home Ins. Co. v. City Council*, 93 U. S. 116, 23 L. D. 825; *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. Ed. 148; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *Newton v. Commissioners*, 100 U. S. 548, 561, 25 L. Ed. 710; *Mutual Life Insurance Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; *Louisville and Nash. R'd Co. v. Kentucky*, 183 U. S. 503, 516, 22 Sup. Ct. 95, 46 L. Ed. 298.

"In the case of *Mutual Life Insurance Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569, the opinion reads:

"The act of 1875 stated the terms upon compliance with which a foreign corporation should be permitted to do business within the state of Tennessee. There was, however, no contract that those conditions should never be altered, and when pursuant to the provisions of the act of 1875 this power of attorney was given by the corporation the state did not thereby contract that during all of the period within which the company might do business within that state no alteration or modification should be made regarding the conditions as to the service of process upon the company. When, therefore, in 1887 the legislature passed another act and therein provided for the service of process, no contract between the state and the corporation was violated thereby, or any of its obligations in any wise impaired, for the reason that no contract had ever existed. Instead of a contract, it was a mere license given by the state to a foreign corporation to do business within its limits upon complying with the rules and regulations provided for by law. That law the state was entirely competent to change at any time by a subsequent stat-

ute without being amenable to the charge that such subsequent statute impaired the obligation of a contract between the state and the foreign corporation doing business within its borders under the former act.

“ ‘Statutes of this kind reflect and execute the general policy of the state upon matters of public interest, and each subsequent legislature has equal power to legislate upon the same subject. The legislature has power at any time to repeal or modify the act granting such permission, making proper provision when necessary in regard to the rights of property of the company already acquired, and protecting such rights from any illegal interference or injury. (*Douglas v. Kentucky*, 168 U. S. 488, 18 Sup. Ct. 199, 42 L. Ed. 553.) The cases showing the right of a state to grant or refuse permission to a foreign corporation of this kind to do business within its limits are collected in *Hopper v. California*, 155 U. S. 648, 652, 15 Sup. Ct. 207, 39 L. Ed. 297.

“ ‘Having the right to impose such terms as it may see fit upon a corporation of this kind as a condition upon which it will permit the corporation to do business within its borders, the state is not thereafter and perpetually confined to those conditions which it made at the time that a foreign corporation may have availed itself of the right given by the state, but it may alter them at its pleasure. In all such cases there can be no contract springing from a compliance with the terms of the act, and no irrepealable law, because they are what is termed ‘governmental subjects,’ and hence within the category which permits the legislature of a state to legislate upon those subjects from time to time as the public interests may seem to it to require.’ ” (Page 659.)

The State v. Telegraph Co., 75 Kan. 609. Record, 64.

In the Pullman case, the court said :

“ The state went further in its adoption of the principles of equality and uniformity. By section 1339 of *Dassler's Statutes of 1905*, quoted in the opinion in *The State v. Telegraph Co.*, *ante*, p. 609, foreign corporations admitted to do business within the state are made subject to the same provisions, judicial control, restrictions and penalties as domestic corporations — excepting

only the necessary minor differences covered by the Bush act itself. Provisions of this kind are construed to exempt foreign corporations paying license fees and receiving permission to engage in business within the state from any greater duties, burdens, liabilities or restrictions than those thereafter imposed upon domestic corporations (American Smelting Co. v. Colorado, 204 U. S. 103, 27 Sup. Ct. 198, 51 L. Ed. 393.) So that, having the power at the outset to prefer its own corporations by its laws, the legislature renounced that power in favor of foreign corporations which comply with the Bush act.

"By the payment of its charter fee of \$14,800 the defendant would, under the Bush act and the order of the charter board, receive authority to exercise its franchises within the state on the same terms and conditions as domestic corporations for twenty years." (Page 667.)

"The amendment to the defendant's answer states that it has contracted with the railway companies operating interstate railroads in the state of Kansas to furnish them a sufficient number of Pullman cars to meet the demands of the traveling public for that kind of service. Ownership of the cars remains in the defendant. It furnishes facilities for the accommodation of travelers and furnishes conductors and porters, but the cars themselves are used in making up passenger-trains, and are under the complete disposition and control of the railway companies, the defendant reserving the right to charge and collect from passengers holding proper railway tickets compensation for the accommodation furnished them. It is said that the railway companies as common carriers are bound by the laws of Kansas not to grant special privileges or preferences in relation to their service of the public. In supplying the needs and attending to the wants and comforts of the railway companies' passengers the defendant acts as the agent of such companies, agrees to furnish without discrimination equal facilities to all passengers who apply for them, and agrees not to withhold such privi-

leges from any properly demeanored person provided with the requisite kind of transportation." (Page 668.)

"The amendment to the answer is defective in that its statement of facts does not go far enough to show an exoneration of the defendant from a public-welfare law, even upon the theory of the law for which it contends.

"The assertion that the defendant cannot under the terms of its contracts withdraw from furnishing the required facilities to passengers traveling from point to point within the state is not an allegation of fact, but the defendant's conclusion of law respecting the binding effect of its agreements. It states what the defendant conceives to be the legal principle governing its relations with the railroad companies, and not the facts from which the deduction is made.

"The pleading withholds from the court all information respecting the duration of the contracts. Unless they are for a definite period, and are not terminable at the defendant's will, the legal conclusion stated does not follow. If they are for ninety-nine years, or in perpetuity, the question would be presented if private corporations performing services to the public may secure everlasting immunity from police regulation by an agreement between themselves.

"The defendant is undertaking to produce new matter which will destroy the case made by the petition. It proposes to show that an otherwise proper exercise of one of the state's most important powers should be stayed for a special and exceptional reason. Conceding that the police power of the state can be suspended by private agreement, any contract proffered as having the effect must be construed most strongly against the corporation and in favor of the state: and when such a contract is spread upon a pleading, nothing can be left to inference or taken by implication.

"The court also deems the answer to be insufficient in that it proceeds upon an erroneous theory respecting the law. The obligation of a contract is its engaging quality—the attribute of binding force upon the parties to it, and in this instance neither the Bush law nor a judgment of this court enforcing it can have any in-

pairing effect upon the obligation of the contracts between the defendant and the railroad companies which it has engaged to serve. Every right and every remedy each party had against the other when the contracts were made remains in full force and effect. Not a term or a condition is changed or dispensed with or its efficacy weakened. The railroad companies may still call upon the defendant to furnish cars and equipment and attendants for its Pullman passengers or to respond in damages. The defendant may demand that its cars be hauled by the railroad companies, and may vindicate as against such companies every right secured to it by its contracts, including the right to demand and receive from the occupants of its cars compensation for services rendered. The value of the contracts to the defendant may be greatly diminished, but the obligation of the parties to each other is not affected in the slightest degree.

“Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by state and national legislation. For such legislation demanded by the public good, however it may retroact on contracts previously made, and enhance the cost and difficulty of performance, or diminish the value of such performance to the other party, there is no restraint in the federal constitution so long as the obligation of performance remains in full force.” (*Curtis v. Whitney*, 80 U. S. 68, 70, 20 L. Ed. 513).

“This court had occasion to interpret the Bush act with reference to its effect upon contracts in the case of *The State v. Book Co.*, 69 Kan. 1, 76 Pac. 411, 1 L. R. A., n. s., 1041. It was held that the purpose of the law was the regulation of foreign corporations by the state, and that contracts are not invalidated or the binding force of obligations impaired even although created by a foreign corporation after the Bush act took effect and before compliance with its requirements. It was said that the enforcement of the law is a matter for the state alone. Contracts made by an unlicensed corporation are not unlawful, and neither party to a contract with such a corporation on one side can secure release by

pleading failure to obey the statute. Much less can it be said that the law weakens the obligatory quality of contracts made prior to 1898." (Pp. 669, 670, 671.)

"As shown by the authorities cited in the *State v. Telegraph Co.*, *ante*, p. 909, the forbearance of the state to impose restrictions upon the conduct of the defendant's business within the state at an earlier date did not atrophy its power. The state was not obliged to anticipate that the defendant might make contract in domination of its authority and hasten action to prevent the corporation from emancipating itself. It was required to consult nothing but the best interests of its people, and whenever occasion arose it could draw upon its constitutionally reserved fund of power to the extent necessary to promote their welfare.

"The defendant itself was charged with full knowledge of the law and of the fact that the tenure of its franchises was at the sufferance of the state, and no individual or corporation could by making a contract with the defendant secure for it a supremacy over the laws which it could not by itself attain. Every person contracting with the defendant did so charged with the knowledge that the state could and might rightfully change its policy of comity at any time. If it did so the defendant's ability to perform might be impaired or destroyed, and its obligation to perform might have to be satisfied with damages. The state having violated no contract with the defendant or the parties to which the defendant has engaged itself, and having preserved in full force the obligation of the contracting parties to each other, neither of them can complain of the enactment of the Bush law. (See *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 619, Sup. Ct. 553, 43 L. Ed. 823.)

"The defendant's case is not improved by pleading that it has undertaken to serve the railway companies' passenger according to the anti-discrimination law of Kansas. The obligation to do this is no different from the obligation to perform any other act according to a righteous standard. It will not be impaired when the obligation of other contracts would not be impaired. It

will be as binding upon the defendant after a judgment of ouster as before." (Pp. 673, 674.)

The State of Kansas v. The Pullman Co., 75 Kan. 664. Record, 33-35.

It therefore appears that there are no grounds for the claim of the defendant that a contract existed between it and the state, and no grounds for the assumption that the present law impaired the obligation of any contract between itself and the state, or between itself and its patrons. No foreign companies having been admitted to the state prior to the passage of the Bush law, a claim of discrimination under the terms of that law against such corporations seeking to comply with its terms and domestic corporations is clearly without foundation. Foreign companies are given the dignity and privileges of domestic corporations exactly upon the same terms that the same things are granted to domestic corporations.

We therefore submit :

First. That the construction of the state statutes is a question for the state courts alone.

Second. That the record in this case presents no color of any attempt to deprive the defendant of any of its constitutional rights in the state of Kansas.

We therefore pray that the judgment of the court be affirmed.

Respectfully submitted,

FRED S. JACKSON, *Attorney-general.*

C. C. COLEMAN, *of Counsel.*



FILED
FEB 26 1908
JAMES W. McKENNEY
CLERK

**In the Supreme Court
of the United States.**

OCTOBER TERM, 1907.

No. 100, **725-5**

THE PULLMAN COMPANY, *Plaintiff in Error.*

vs.

THE STATE OF KANSAS, *ex rel. C. C. COLEMAN,*
Attorney-general of said State, *Defendant in*
Error.

MOTION TO ADVANCE.

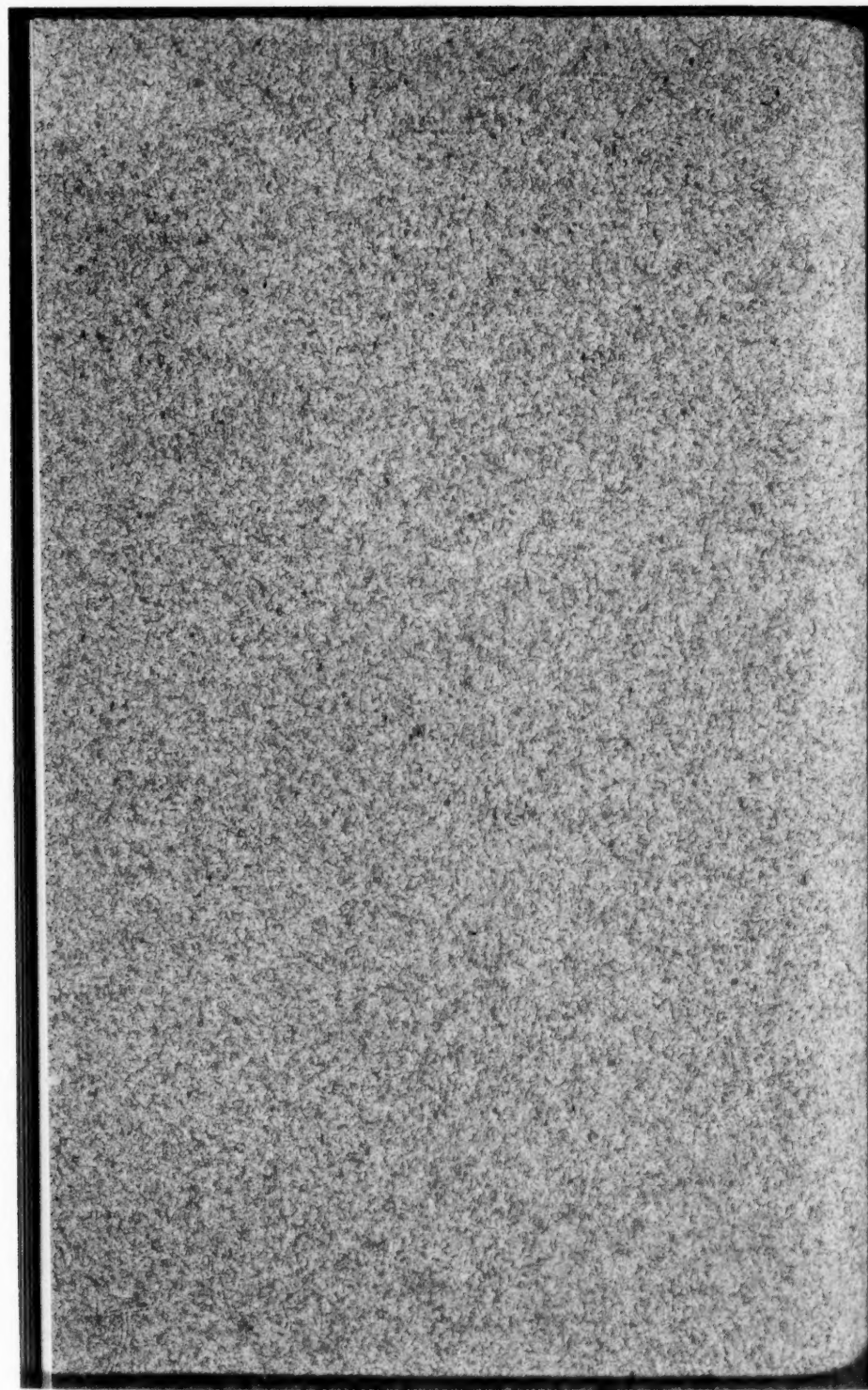
FRED E. JACKSON, Attorney-general.

JOHN S. DAWSON, Asst. Attorney-general.

Attorneys for Defendant in Error.

C. C. COLEMAN,

Of Counsel.



In the Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 381.

THE PULLMAN COMPANY, *Plaintiff in Error,*

vs.

THE STATE OF KANSAS, *ex rel. C. C. COLEMAN,*
Attorney-general of said State, *Defendant in Error.*

MOTION TO ADVANCE.

COMES now the State of Kansas, defendant in error, by Fred S. Jackson, the duly elected, qualified and acting attorney-general of said State, and moves the Court to advance the above entitled cause to an early hearing.

THE MATTER INVOLVED

is the legality of a judgment of the Supreme Court of the State of Kansas wherein the plaintiff in error was ousted from the exercise of its corporate functions within the State of Kansas on all business of a purely *intrastate* and *domestic* character for the reason that the plaintiff in error, the Pullman Company, a corporation of the State of Illinois, had failed to pay to the State of

Kansas the charter fee required by law to entitle said corporation to enjoy and exercise its corporate franchises, functions, rights and privileges, in the transaction of business wholly within the State of Kansas.

THE REASONS FOR THIS APPLICATION are, *First*, That the matter is one of great public interest to the State of Kansas, to its public revenues, and concerning the power of the State to oust a foreign corporation for usurping the franchises and privileges of the State without compliance to its constitutional and valid laws.

Second, That there are a number of complaints against the said Pullman Company, plaintiff in error, now under consideration before the Board of Railroad Commissioners of the State of Kansas concerning certain methods and practices of said company in the transaction of its business within the State of Kansas, and the State of Kansas is greatly hindered and impeded in the adjustment and settlement of such affairs by the pendency of this cause in this Court.

FRED S. JACKSON,

Attorney-general.

JOHN S. DAWSON,

Asst. Attorney-general.

Attorneys for Defendant in Error.

C. C. COLEMAN,

Of Counsel.

